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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 242 43.

THE NORTHERN CENTRAL RAILWAY COMPANY, PLAINTIFF IN ERROR,

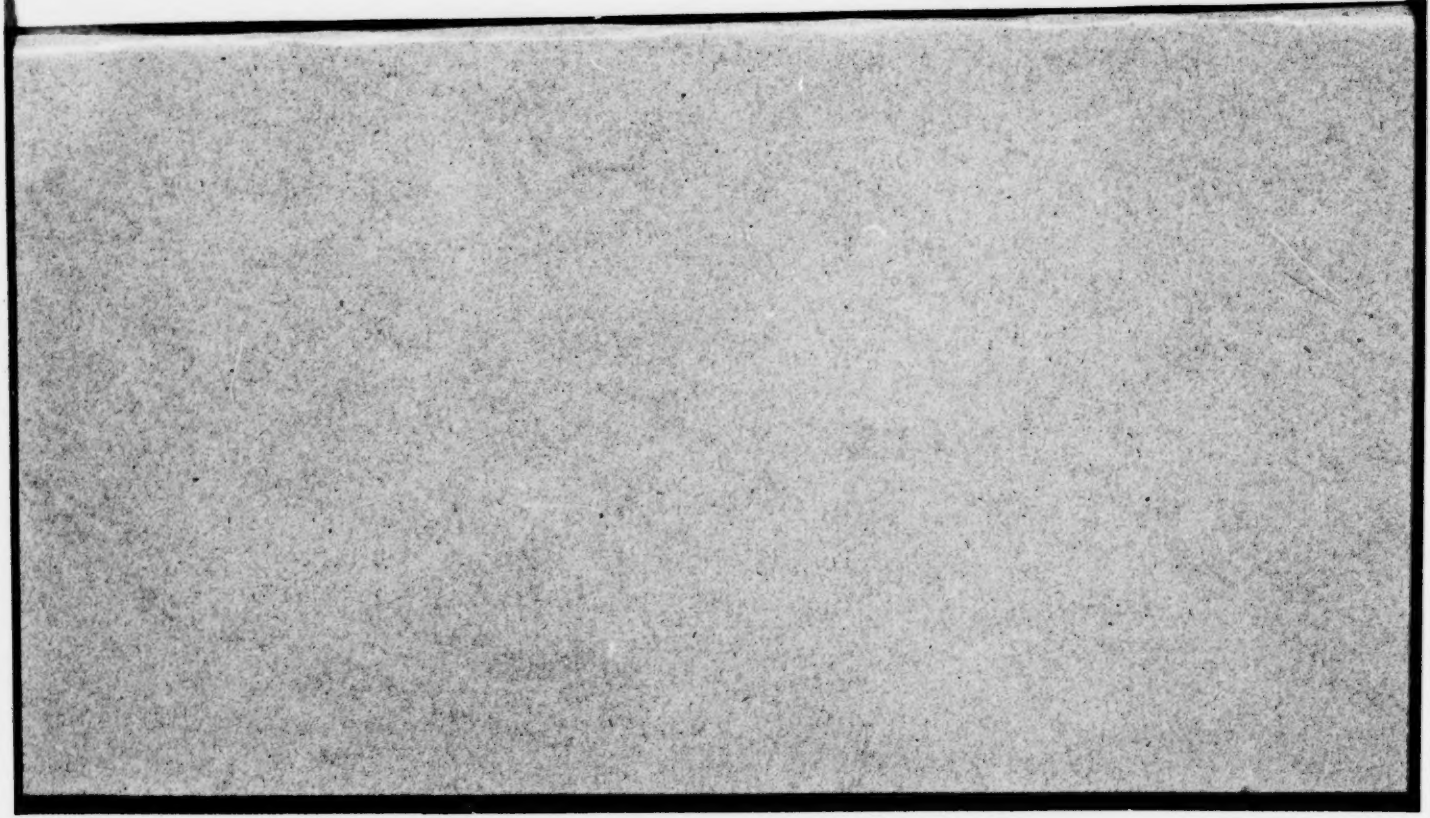
vs.

THE STATE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED JANUARY 9, 1901.

(18,037.)



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1 In the Court of Appeals of Maryland.

Petition, Order, and Assignment of Errors.

THE NORTHERN CENTRAL RAILWAY COMPANY, Appellant, *vs.* THE STATE OF MARYLAND, Appellee. } Petition for Writ of Error.

Appeal from the superior court of Baltimore city.

Comes now the appellant, The Northern Central Railway Company, and says that on the 7th day of December, 1900 judgment in this case was entered by this court in favor of the appellee and against the appellant, by which said judgment the appellant was aggrieved in that in said judgment and the proceedings had prior thereto
2 in this case, certain errors were committed to the prejudice of this appellant, all of which will appear more in detail from assignment of errors filed with this petition. Wherefore the appellants prays that a writ of error may issue to the Supreme Court of the United States for a correction of the errors complained of, and that a duly authenticated transcript of the record proceedings and papers herein may be sent to the said Supreme Court of the United States.

BERNARD CARTER,
Att'y for the Northern Central Railway Company.

STATE OF MARYLAND:

Desiring to give the petitioners an opportunity to test in the Supreme Court of the United States the questions presented in
3 the aforegoing petition, and in the assignment of errors filed therewith, it is hereby ordered that a writ of error be allowed to said court and that the same be made a supersedeas, upon filing by the petitioner of a bond in the penal sum of twenty thousand dollars in the form, and with a surety, to be approved by me.

In testimony whereof, witness my hand this twenty-ninth day of December, 1900.

JAMES McSHERRY,
Chief Judge of the Court of Appeals of Maryland.

4 UNITED STATES OF AMERICA:

Supreme Court.

THE NORTHERN CENTRAL RAILWAY COMPANY, Plaintiff in Error, *vs.* THE STATE OF MARYLAND, Defendant in Error. } Assignment of Errors.

In the case, in the court of appeals of Maryland begun and holden at Annapolis in the State of Maryland on the 1st Monday of October

1900, wherein the said The Northern Central Railway Company was appellant, and The State of Maryland was appellee, and wherein final judgment was entered in favor of the said appellee against the said appellant, (and said court being the highest court of law and equity of the said State in which a decision could be had in
5 the said case) upon the writ of error allowed upon the said judgment returnable to the October term of the Supreme Court of the United States to be begun and holden in the city of Washington in the District of Columbia, on the 2nd Monday of October, 1901, the said The Northern Central Railway Company, the plaintiff in error, makes the following assignment of errors committed by said court of appeals of Maryland, as appears by the record in the said case; that is to say, that although by a statute of the State of Maryland, to wit, the act of the General Assembly of Maryland of 1880, chapter 16, and by the acceptance thereof by the said plaintiff in error, and the doing of all the things required of it by the terms of said act of assembly of said State, a valid contract, upon legal and valuable consideration, was entered into between The State of Maryland,
6 the defendant in error, and The Northern Central Railway Company, plaintiff in error, whereby the State agreed that no tax should ever be imposed under the laws of said State upon the property, franchises or gross receipts of the plaintiff in error, except an annual tax of one-half of one per cent. on the gross receipts of the company within the State of Maryland; and although said contract was irrevocable, except upon the assent of both parties to it, and so is within the provisions and protection of the tenth section of the first article of the Constitution of the United States; yet, nevertheless, the said State of Maryland by a statute of said State, to wit, the act of the General Assembly of Maryland of 1890, chapter 559, in the record in said case fully set forth, imposed a greater tax than one-half per centum per annum on the
7 gross receipts of the plaintiff in error within the State of Maryland—that is to say, it imposed a tax of one per centum per annum on said gross receipts for each and every year, and so impaired the contract made as aforesaid between the State of Maryland and the plaintiff in error; and by the determination and judgment of said court of appeals of Maryland, to review which said writ of error has been sued out, allowed, and is prosecuted, it is determined and adjudged that the said statute of the State of Maryland, to wit, the said act of 1890, chapter 559, is a valid exercise of the rightful authority of the State of Maryland, and that the said last-mentioned act of assembly validly imposed upon the plaintiff in error a tax of one per centum per annum upon its gross receipts within the State of Maryland, and validly ab-
8 rogated the contract made between the said State of Maryland, and the plaintiff in error by the passage of the said act of the General Assembly of Maryland of 1880, chapter 16, and the acceptance thereof and performance of the terms and conditions thereof by the plaintiff in error; and that the said statute of

said State, to wit, the act of 1890, chapter 559, is not contrary to the provisions of the Constitution of the United States of America.

And the plaintiff in error says that the rulings, determinations and judgment of the said court of appeals of Maryland, contained in and shown by the said record, in respect of the construction and interpretation of the contract made between the State of Maryland and the plaintiff in error by the said act of assembly of Maryland
9 of 1880, chapter 16, and in reference to the right and power of the State of Maryland to abrogate and annul the same, and in sustaining the validity of the said statute of the said State, to wit the act of the General Assembly of Maryland of 1890, chapter 559, are repugnant to the provisions of section 10 of article one of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

There is error also in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the State of Maryland against the said The Northern Central Railway Company, whereas by the law of the land the said judgment ought to have been given for the said railway com-
10 pany, and against the said State of Maryland, and the said The Northern Central Railway Company prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings and the matters herein set forth, may be reversed, annulled, and held for nothing, and that it may be restored to all things which it has lost by occasion of said judgment.

THE NORTHERN CENTRAL RAILWAY COMPANY.
By BERNARD CARTER, *Its Attorney.*

Filed Dec. 31st 1900.

11 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Maryland, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Maryland, before you or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit, between the State of Maryland and the Northern Central Railway Company, wherein was drawn in question the validity of, or an authority exercised under, said State, on the ground of their being repugnant to the Con-
12 stitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage to the said The Northern Central Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command

you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid
13 being inspected, the said Supreme Court may further cause to be done therein for the correction of that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the circuit court of the United States for the district of Maryland, the thirty-first day of December, in the year of our Lord one thousand nine hundred.

[Seal of the U. S. Circuit Court, Dist. of Maryland.]

JAS. W. CHEW,
Clerk U. S. Circuit Court for the District of Maryland.

Allowed by—
JAMES McSHERRY,
Chief Judge of the Court of Appeals of Maryland.

Filed Dec. 31st 1900.

14 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the State of Maryland, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Maryland, wherein The Northern Central Railway Company is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

15 Witness the Honorable James McSherry, chief judge of the court of appeals of Maryland, this 15th day of January, in the year of our Lord one thousand, nine hundred and one.

JAS. McSHERRY,
Chief Judge of the Court of Appeals of Maryland.

We hereby certify that on this 17th day of January, one thousand, nine hundred and one, there was delivered to me a true copy of the above citation.

GEORGE R. GAITHER, JR.,
Attorney for State of Maryland, Defendant in Error.

Filed January 21st 1901.

16 *Record.*

In the Court of Appeals of Maryland.

THE STATE OF MARYLAND
vs.
THE NORTHERN CENTRAL RAILWAY COMPANY. } No. —.

Appeal from the superior court of Baltimore city.

Att'y General Gaither, for State.
Bernard Carter, for appellee.

Filed September 14, 1899.

17 *Record.*

In the Court of Appeals of Maryland.

THE STATE OF MARYLAND
vs.
THE NORTHERN CENTRAL RAILWAY COMPANY. } Appeal from the Superior Court of Baltimore City.

Appeal to October term, 1899.

George R. Gaither, Jr., for appellant.
Bernard Carter, for appellee.

Filed: —— —, 1899.

18 In the Superior Court of Baltimore City.

THE STATE OF MARYLAND
vs.
THE NORTHERN CENTRAL RAILWAY COMPANY. }

Appeal from the superior court of Baltimore city.

Action commenced September 25th, 1896.

Declaration.

BALTIMORE CITY, *To wit:*

In the Superior Court of Baltimore City.

The State of Maryland, plaintiff, by George R. Gaither, Jr., attorney, sues The Northern Central Railway Company, a body corporate, duly incorporated, defendant:

1. For the defendant has refused and neglected to pay and still owes the State tax of one per centum upon the gross receipts of the said company within the State of Maryland, duly levied and assessed against it for the year 1896, amounting to $13,142.35, with interest thereon from the 1st day of July, 1896, and with an ad-

ditional amount of five per centum upon the amount of said tax, as provided for by Acts of 1890, chapter 559. And the plaintiff claims $16,000.

GEORGE R. GAITHER, JR.,
Attorney for the Plaintiff.

19 *Account and Certificate of Comptroller.*

Filed with declaration.

State tax on gross receipts.

The Northern Central Railway Company to State of Maryland, Dr.

To State tax of one per centum on $1,314,234.52, being the gross receipts of the said company within the State of Maryland, for the year ended January 31st, 1896..... $13,142.35

☞ By the act of 1890, chapter 559 it is provided that it shall be the duty of the comptroller of the treasury to receive such accounts of State taxes so transmitted to him by the State tax commissioner, and forthwith to proceed to notify each such corporation or company of the amount of such State tax. Any corporation or company feeling aggrieved at the ascertainment or assessment of the State tax commissioner, may appeal within 30 days to the comptroller and treasurer, who shall hear such appeal and decide finally upon such ascertainment or assessment. If no appeal is taken within 30 days from the date of such notification, the said ascertainment or assessment of the State tax commissioner shall be final. That such taxes shall be due and payable on or before the first day of July in each year, and that if any such corporation or company from whom such taxes shall be due on its gross receipts or revenues as aforesaid, shall fail or neglect to pay the same to the treasurer of the State for the space of one month after the same shall be due and payable, such corporation or company shall for such failure or neglect forfeit and pay to the State of Maryland an additional amount of 5 per centum as penalty or damages.

STATE OF MARYLAND:

TREASURY DEPARTMENT,
COMPTROLLER'S OFFICE, ANNAPOLIS, MD.

I hereby certify that the aforegoing is a true copy taken from the original on file in the office of the comptroller of the State of Maryland.

Witness my hand and official seal this 21st day of Sept., A. D. 1896.

[SEAL.]

ROBERT P. GRAHAM,
Comptroller of the Treasury.

20 *Docket Entries.*

October 12th, 1896.—Appearance by attorney and plea not indebted as alleged short, and issue joined.

November 30th, 1898.—Case tried before Hon. J. Upshur Dennis, without a jury.

Opinion.

Filed June 6, 1899.

By chapter 72 of the Acts of 1827, the Baltimore and Susquehanna R. R. Co. was incorporated, and by one of the provisions of that act, it was stipulated that its property should be exempt from taxation.

The act of 1854, ch. 250, incorporated the present defendant, consolidating it with the Baltimore & Susquehanna R. R. Co., and granting it all the rights, franchises and immunities possessed by the latter company.

By the Acts of 1872, ch. 234, and 1874, ch. 408, a tax of one-half of one per cent. was levied annually upon the gross receipts of all steam railroad companies, incorporated by this State and doing business herein.

To the payment of this tax the defendant objected, claiming that by virtue of its possession of all the immunities of the Baltimore & Susquehanna R. R. Co., whose property was expressly declared to be free from all taxation, it had fallen heir to this exemption; while in behalf of the State it was contended that the effect of the act of 1854, incorporating the defendant, was to create a new corporation, which derived all its rights and franchises by virtue of, and under, the new grant—that the right to exemption of its property from taxation which it had acquired by reason of its ownership of the privileges and immunities of the Baltimore and Susquehanna R. R. Co., was held under this new grant; and that the constitution of 1851, having made all charters granted subsequently repealable, or subject to modification, at the will of the legislature, and this right to exemption having been acquired by this subsequent charter (to wit, the act of 1854), was subject to repeal by the legislature, and had been repealed by the acts of 1872 and 1874; and that, therefore, the property of the defendant was subject to the tax imposed by those acts.

A suit was brought by the State to enforce this tax; the lower court decided in favor of the contention of the company, but the court of appeals reversed this decision, sustained the claim of the State, and remanded the case for further proceedings, Judge Alvey dissenting in an elaborate opinion. State *vs.* N. C. R. R. Co., 41 Md.

21 While this was the status of the litigation, and before any further steps were taken by the counsel for the State to render this decision effective, the act of 1880, ch. 16, was passed; and the true construction, and validity of this act, are the questions now before us for determination.

In construing a statute, in order to arrive at the true intention of

thelegislature, we must look to the whole of it—the preamble, as well as the full text. In fact, the preamble has been called the "key to the construction," and in this case, it seems to me to throw light upon, and make clear, not only the intention of the legislature, but every provision that might otherwise, by forced construction, appear in any way doubtful.

The preamble recites the respective claims of the State and of the company (the claim of the State being that, by reason of the fact that the act of 1854, ch. 250, was passed during the existence of the constitution of 1851, the exemptions thereby granted were repealable, and had been repealed; the claim of the company being to the contrary); and then further recites, that the State, instead of leaving the question to be decided by the Supreme Court of the United States preferred a settlement and compromise of the matter in controversy and litigation; and that the company was willing, in settlement of said matters, to pay an annual tax of one-half of one per cent. on the gross receipts of the company within the State, upon the terms and conditions set forth within the act. The act then provided that the company should have all the powers, rights, privileges and immunities, and be subject to all the duties and obligations granted to the Baltimore & Susquehanna R. R. Co., under the act of 1827, ch. 72; but with this limitation that the property, franchises and gross receipts of the company shall be subject to State taxation, to the extent of one-half of one per cent. on the gross receipts of the railroad and its branches, lying within the State of Maryland, and from all other sources within said State; and that said property and franchises and gross receipts should not be subject to any other tax under the laws of Maryland. It was further provided that before the act should become binding upon the State, it must be specifically accepted by the company in evidence of its assent thereto, and that the company should make certain money payments, fixed by other provisions of the act.

The acceptance by the company of this act, and payments of money provided for under it, are conceded.

In my judgment this act was a contract between the State and the defendant company, forever binding until abrogated by the consent of both parties to the contract, and in no way subject to
22 repeal or modification by the act of any subsequent legislature; and, therefore, the assessment acts of 1896, by which a greater tax was imposed upon the gross receipts of the company, is void, because repugnant to the Constitution of the United States, which forbids a State from passing a law impairing the obligation of a contract.

That the State has a right to make such a contract, seems clear. Its powers are limited only by the Constitution of the State and of the United States; and when, in its judgment, for the reasons set forth in the act, it considered the settlement a proper one for the State, its judgment is conclusive.

That the contract was supported by a sufficient consideration, moving from the company, appears on the fact of the act. It was a settlement of all disputed questions between the State and the com-

pany, under which the company paid a large sum to the State, agreed to pay forever an annual tax of one-half of one per cent. on its gross receipts, to abandon its claim to exemption from taxation, and its right to have decided by the Supreme Court of the United States the question as to whether it was bound to pay anything at all. Leaving out the money payments, the settlement of a doubtful claim, or relinquishment of a pending suit, is a good consideration for a contract; and it is sufficient if the parties thought at the time there was a *bona fide* question between them, although it may eventually turn out there was no such question in fact.

Hartte *vs.* State, 27 Md., 172. L. R., 5 Q. B., 541.
Callisher *vs.* Bis.

The argument that because the right of the company to take the case to the Supreme Court, at the time of the passage of the act of 1880, had not matured, is of no weight. It is true that, the litigation was not then in a state in which the company could have taken an appeal; the situation because of technical reasons, was not ripe for it; but it is undeniable that the company had at all times a reserved right, under which they could, at the proper time, have had the question in dispute between it and the State passed upon by the Supreme Court of the United States; and this right, they forever abandoned by accepting the compromise of the act of 1880.

If then the act of 1880 was a contract duly entered into by the parties—was a contract which both parties were fully competent to make—and was supported by a sufficient consideration, upon what principle can it be repealed, without the consent of both parties to it? And yet the act of 1896, does, according to the contention of the learned counsel for the State (and in this much of his contention I concur), undertake to repeal this compromise act of 1880, in so far as the rate of taxation is concerned, and to subject the gross
23 receipts of the company to a much higher rate of taxation, without restoring to the company any of the advantages which passed to the State under the act of 1880, and when the company, by accepting the provisions of said act, has forever lost its right to have the question of the right of the State to tax it at all, by reason of the act of 1827—incorporating the Baltimore & Susquehanna Railroad Co.—passed upon by the Supreme Court of the United States.

The learned counsel for the State contends that one legislature cannot make an exemption from taxation so as to be unrepealable by a future legislature. This is true, in this State since the constitution of 1851, where the exemption is granted in a charter; in such a case, the charter is accepted by the company subject to this reserved right of repeal or modification, a provision first ingrafted upon our organic law by that constitution, and secured by our several subsequent constitutions; but where the company has been duly chartered, and where the exemption from taxation is provided for in a contract between the State and the company, which contract is based upon new and sufficient consideration, and is in all other respects legal, a clause of exemption from taxation is just as binding and effective as any other provision of the contract. Learned judges have

often expressed regret that it should be in the power of one legislature to thus barter away the sovereign power of taxation so as to be beyond the remedial action of a subsequent legislature; but no case has been cited in which the right to nullify such an exemption where it is secured by contract between the State and company has been upheld.

As has been said, if this exemption had been simply contained in the charter, it would be repealable by reason of the constitutional provision; and while every charter is commonly said to be a contract between the State and the incorporators (very inaccurately so stated, according to the true definition and idea of a contract and charter respectively, as now adopted by the best authorities,) yet, even if it be conceded that a charter is a contract, it by no means follows that every contract is a charter, or modification of a charter, even though such contract may have reference to some of the sovereign powers of the State.

In the present case, it is clear that the act of 1880 was neither a charter nor modification of the defendant's charter. It invested it with no additional corporate powers or rights; it left them unaltered as they stood; and simply provided that, for consideration satisfactory to the State which were offered by the company, the State would subject its property to a certain fixed method and rate of taxation. The constitutional provision was never intended to interfere with the right of the State to enter into such contracts when it
24 deemed it proper to do so for its own benefit and protection; and such a contract is just as obligatory upon the State as if it was made between it and a private person; and cannot be repealed, under the provision of the Constitution of the United States forbidding the State to pass any law impairing the obligation of contracts, without the consent of both parties to it.

I agree with the learned counsel for the State in his construction of the act of 1890, ch. 559, and the assessment act of 1896, and think these acts were intended to repeal, and that the repealing language used is broad enough to cover, the exemption claimed by the defendant under the act of 1880; but, it is unnecessary to go at length into the reasons for this conclusion, in view of the ruling on the question discussed above.

I will, therefore, reject the prayers of the plaintiff and the second prayer of the defendant, and grant the defendant's first prayer.

J. UPSHUR DENNIS.

(Inserted per verbal order of plaintiff's attorney.)

Order of Court and Statement of Counsel for Defendant.

Filed 10th July, 1899.

Mr. Clerk:

Enter a verdict in favor of the plaintiff for the sum of sixty-five hundred and seventy-one dollars and seventeen cents.

J. UPSHUR DENNIS.

BALTO., *July* 6, 1899.

The above-mentioned amount $6,571.17 is the correct amount of verdict under rulings of the court.

BERNARD CARTER,
Att'y for Def.

Docket Entries.

July 10th, 1899.—Verdict for plaintiff for $6,571.17 and judgment on verdict.

25 *Plaintiff's Order for Appeal and Affidavit.*

Filed July 10th, 1899.

Mr. Ogle, clerk:

Enter an appeal on behalf of The State of Maryland, plaintiff, from the judgment in this case, to the court of appeals of Maryland.

GEORGE R. GAITHER, JR.,
For State.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this 10th day of July, in the year eighteen hundred and ninety-nine, before the subscriber, the clerk of the superior court of Baltimore city, personally appeared George R. Gaither, Jr., attorney general of the State of Maryland, and made oath in due form of law, that the appeal taken in the said above-entitled case by the State of Maryland, is not taken for delay.

ROBERT OGLE,
Clerk Superior Court of Baltimore City.

Plaintiff's Bill of Exceptions.

Filed July 10th, 1899.

At the trial of the above-entitled case the plaintiff offered in evidence the certificate of the comptroller of the State of Maryland, setting forth the indebtedness of the defendant, as follows:

(NOTE.—The certificate of the comptroller herein called for is annexed to the account filed with the declaration, hereinbefore inserted.)

The plaintiff then offered in evidence the act of assembly of Maryland of 1890, chapter 559.

The plaintiff then offered in evidence a certificate of the docket entries of cases Nos. 59 and 60 in the October term, 1875, of the court of appeals of Maryland, brought by the State of Maryland against the Northern Central Railroad Company, in which cases the judgments of the superior court of Baltimore city in favor of the said company were reversed by the court of appeals, and a new trial ordered by the court on the 2d day of March, 1876; also the docket entries in said cases in the superior court for Baltimore city,

showing that no new trial had taken place in said cases, and that said cases were pending in January, 1880.

26 The plaintiff, having closed its testimony, the defendant then to support the issues on its part, offered in evidence the act of assembly of Maryland of 1854, chapter 250; the act of assembly of Maryland of 1872, chapter —, and the act of assembly of Maryland of 1874, chapter —.

The defendant further offered in evidence the act of assembly of Maryland of 1880, chapter 16, which last-mentioned act of assembly of Maryland was admitted in evidence, subject to exception by the plaintiff.

The defendant thereupon read in evidence the said act of assembly of Maryland, 1880, chapter 16:

An act to adjust and settle finally, by agreement, all pending controversies between the State of Maryland and the Northern Central Railway Company, by subjecting the franchises and property of said company within this State to taxation for State purposes to a certain extent, and by providing for the payment of a certain indebtedness claimed by the State of Maryland to exist on the part of said Northern Central Railway Company to said State of Maryland, being an act supplementary to the act of eighteen hundred and fifty-four, chapter two hundred and fifty, entitled An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Rail— Company, and the Susquehanna Railroad Company, by the name of the Northern Central Railway Company.

Whereas, a controversy has arisen and exists between the State of Maryland and the Northern Central Railway Company in reference to the rights of the State of Maryland to subject to taxation the franchises and property of the Northern Central Railway Company, the said company claiming exemption of the same from taxation upon the grounds that among the terms and conditions of the union and consolidation of the several companies by which said Northern Central Railway Company was formed is one; that the latter should have all the rights, privileges and immunities of each of said companies, which said terms were entered into under the authority given by the act of Maryland of eighteen hundred and fifty-four, chapter two hundred and fifty, which moreover declared that said Northern Central Railway Company should have all the powers and privileges expressed in the charter granted by the State of Maryland to the Baltimore and Susquehanna Railroad Company, among which privileges was immunity from taxation.

And whereas, the State of Maryland having, by the act of eighteen hundred and seventy-two, chapter two hundred and thirty-four, and the act of eighteen hundred and seventy-four, chapter four

27 hundred and eight, imposed an annual tax of one-half of one per centum on the gross receipts of all railroad companies worked by steam incorporated by or under the authority of said State of Mary-

land, and claiming that under said acts the gross receipts of said Northern Central Railway Company are liable to said tax, have instituted suits to recover the same.

And whereas, the property of said company has been also assessed as liable to taxation for county and municipal purposes.

And whereas, the said company has the right to have the question at issue between it and the State of Maryland carried to the Supreme Court of the United States to be there decided.

And whereas it has been represented to this General Assembly that what would be the ultimate decision of said question is a matter of great doubt, and it is deemed to be moreover just and proper that an equitable settlement should be made of the matters so in controversy and it having been represented to this General Assembly that the said Northern Central Railway Company, for the purpose of making such settlement, is willing to pay a tax of one-half of one per centum on the gross receipts within this State, upon the terms and conditions hereinafter set forth; now, therefore—

SECTION 1. Be it enacted by the General Assembly of Maryland, That the Northern Central Railway Company shall have and possess all the powers, rights, privileges and immunities, and be subject to all the duties and obligations which are expressed in the act of assembly of Maryland of eighteen hundred and twenty-seven, chapter seventy-two, entitled An act to incorporate the Baltimore and Susquehanna Railroad Company, but all the franchises and property of every description and gross receipts of said Northern Central Railway Company, within the State of Maryland, shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon the gross receipts from its railroad and branches lying within the State of Maryland, and from all other sources within this State, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland; provided, however, that all such property, works and structures of the said Northern Central Railway Company, which are or may be taxable within the meaning of the decision of the court of appeals of Maryland rendered in the year eighteen hundred and seventy-eight in the case of the State of Maryland against the Baltimore and Ohio Railroad Company, shall be subject to taxation for county and municipal purposes in the same way and to the same extent as the property of individuals.

SEC. 2. And be it further enacted, That this act shall not take effect until the said The Northern Central Railway Company
28 shall have paid to the treasurer of the State of Maryland the sum of twenty-nine thousand seven hundred and sixty-two dollars and fifty-six cents, as mentioned in the third section of this act, nor until this act and all its provisions shall have been accepted in the mode prescribed in the fourth section hereof.

SEC. 3. And be it further enacted, That the payment of the sum of twenty-nine thousand seven hundred and sixty-two dollars and fifty-six cents mentioned in the second section of this act shall be made by said Northern Central Railway Company to the treasurer of the State of Maryland, on or before the first day of July, eighteen

hundred and eighty, and the said treasurer shall receive said sum from said company; and the said sum of twenty-nine thousand, seven hundred and sixty-two dollars and fifty-six cents, when so paid, is hereby declared to be in full satisfaction and discharge of all claims arising under the laws of the State of Maryland for taxes against said company up to December thirty-fi-st, eighteen hundred and seventy-nine, saving and excepting taxes for municipal and county purposes upon the property mentioned in the proviso to the first section of this act.

SEC. 4. And be it further enacted, That the acceptance of this act mentioned in the second section thereof shall be made by the stockholders of said Northern Central Railway Company at a general meeting of the same, the acceptance to be evidenced by an instrument of writing under the corporate seal of said company, which shall be filed in the office of the secretary of State of Maryland.

SEC. 5. And be it further enacted, That upon the compliance of said Northern Central Railway Company with the provisions of the third and fourt- sections of this act, all claims against said Northern Central Railway Company for taxes assessed under any law of the State of Maryland and unpaid by it up to December thirty-fi-st, eighteen hundred and seventy-nine, except municipal and county taxes upon the property mentioned in the proviso to the first section of this act, are hereby declared to be discharged, and all suits or other proceedings heretofore instituted for the enforcement of the payment by said Northern Central Railway Company of taxes shall be dismissed and abandoned on the payment of costs by said company.

SEC. 6. And be it further enacted, That this act shall take effect from the date of its passage, subject nevertheless to all the conditions and limitations in reference to the provisions of said act which are therein set forth.

Approved February 25, 1880.

29 The defendant further offered in evidence the following agreement of counsel:

It is agreed in this case, subject to any objection which may be made by the plaintiff as to its relevancy, as follows:

1. That the sum of $29,762.50, mentioned in the act of assembly of Maryland of 1880, chapter 16, was paid to the treasurer of the State of Maryland before the first day of July, 1880, in accordance with the requirements of the said act of assembly.

2. That the said act of assembly was duly accepted by the stockholders of the Northern Central Railway Company at a general meeting of the said stockholders; and that the said acceptance was evidenced by an instrument of writing under the corporate seal of the said company, which was filed in the office of the secretary of state, before the 1st day of July, 1880. And that the said company from and after the passage of said act paid in each year ½ of one per cent. on its gross receipts described in said act, up to and including

the year ending December 31, 1889, under the terms of the act of 1874, chap. 408.

GEORGE R. GAITHER, JR.,
Att'y for Pl'ff.
BERNARD CARTER,
Att'y for Def't.

The defendant also proved by competent testimony that from the time of the passage of the act of 1880, chapter 16, up to and including the year 1890, the defendant paid in each year one-half of one per cent. on its gross receipts from its railroads and branches lying within the State of Maryland, and from all other sources within said State.

The defendant further proved that after the passage of the act of assembly of Maryland of 1890, chapter 559, the defendant in the years 1891, 1892, 1893, 1894 and 1895 paid to the State of Maryland for each of said years a tax of one per cent. on its gross receipts above mentioned, but in making each of said payments, accompanied the same with a declaration that in making said payments, it in no way waived the right granted to it by the act of assembly of Maryland of 1880, chapter 16, to pay a State tax of one-half of one per cent. on its gross receipts and paying said tax, to be relieved of all other taxes whatsoever, State, county or municipal, except as stated in said act of 1880, chapter 16. The form of said declaration, as made at the time of the payment of said tax for the year 1895, was as follows: (The same form *mutatis mutandis* having been used in the previous years.)

"The Northern Central Railway Company, in calculating the tax on its gross receipts at the rate of one per cent., such being the rate fixed by the act of assembly of Maryland, 1890, chapter 559, for the rate of State tax on the gross receipts of steam railroads, and in paying the amount arrived at by said calculation, in no way waives, or is to be understood as waiving, the right granted to it by the act of assembly of Maryland of 1880, chapter 16, to pay a State tax of one-half of one per cent. on its said gross receipts, and paying said tax, to be relieved of all other taxes whatsoever, State, county or municipal, except as stated in said act of 1880, chapter 16, but on the contrary, insists and relies upon all the rights of exemption given to it by said act of 1880, chapter 16; it makes payment in this year, 1895, as it did in the years 1891, 1892, 1893 and 1894, of tax on its gross receipts of an additional one-half of one per cent. over and above what is required by law to make, as a voluntary contribution towards the revenue of the State, the said payments for said years, not hereafter to be continued, unless by the voluntary act of the said company."

The defendant further proved by competent testimony that on the 26th day of June, 1896, the defendant tendered to the treasury department of the State of Maryland the sum of six thousand, five hundred and seventy-one dollars and seventeen cents, which was one-half of one per cent. on the gross receipts of the defendant from its railroad and branches lying within the State of Maryland, and

from all other sources within said State, as the amount payable by it on its gross receipts for the year ending January 31st, 1896, and accompanied the said tender with a letter to the treasurer of the State of Maryland, dated June 26th, 1896, which letter is as follows:

Northern Central Railway Company, office of the auditor.

BALTIMORE, *June* 26, 1896.

Thomas J. Shryock, Esq., treasurer State of Maryland.

DEAR SIR: Referring to the bill sent by your department to the Northern Central Railway Company for the amount payable by it for the gross receipts tax for the year ending January 31, 1896, I beg respectfully to say that the bill is made out on the basis
31 of one per cent. upon the amount of the gross receipts in the State of Maryland, whereas under the act of 1880, chapter 16, this company is only required to pay one-half of one per cent., instead of one per cent.: the bill therefore should be made out upon the basis of one-half of one per cent. instead of the basis of one per cent.

For several years past, the N. C. R'y Company has been paying at the rate of one per cent. but in doing so, stated on the face of the return of gross receipts made to the comptroller, as follows:

"The Northern Central Railway Company in calculating the tax on its gross receipts at the rate of one per cent. such being the rate fixed by the act of assembly of Maryland, 1890, chapter 559, for the rate of State tax on the gross receipts of steam railroads, and in paying the amount arrived at by said calculation in no way waives, or is to be understood as waiving the right granted to it by the act of assembly of Maryland of 1880, chapter 16, to pay a State tax of one-half of one per cent. on its said gross receipts, and paying said tax to be relieved of all other taxes whatsoever, State, county or municipal, except as stated in said act of 1880, chapt. 16, but on the contrary insists and relies upon all the rights of exemption given to it by act of 1880, chap. 16, it makes payment in this year of taxes on its gross receipts of an additional one-half of one per cent. over and above what it is required by law to make as a voluntary contribution towards the revenue of the State, the said payments of said years not hereafter to be continued unless by the voluntary act of the said company."

The payment of this rate was made voluntary by the company, the rate imposed on other Cos. being one per cent. but as the rate upon the gross receipts has been so largely increased under the new law, the company has determined to pay only the sum which by the act of 1880, ch. 16, is required to pay, which is one-half of one per cent.

Yours truly,
(Signed) J. P. KERR, *Auditor.*

The defendant received in reply the following letter from the comptroller of the State of Maryland:

32 STATE OF MARYLAND:

Treasury department, comptroller's office.

ANNAPOLIS, *July* 31*st*, 1896.

J. P. Kerr, Esqr., auditor Northern Central Railway Co., Baltimore city, Md.

MY DEAR SIR: Your letter of June 26th, '96, enclosing draft in favor of the State of Maryland for $6,571.17, was duly received and contents carefully noted, and afterwards referred to Mr. H. M. Clabaugh, attorney general of the State, for his opinion, etc.

In reply I beg leave to say that I cannot receive your draft for above amount, nor any draft for a less amount than the full 1 % on gross receipts of your railway; and I herewith return the draft forwarded by you to this office for $6,571.17.

Unless payment of the 1 % on gross receipts is made by the Northern Central Railway Co. to the State of Maryland, suit for collection of same will be entered against said Co.

Most truly yours, ROBERT P. GRAHAM,
Comptroller,
Per T. H. WILLIAMS, *Chf Clk*

The defendant further proved by competent testimony, that from the passage of the act of 1880, chapter 16, the defendant complied with all the provisions of said act.

The defendant thereupon closed its testimony.

The plaintiff thereupon moved the court to strike out the act of 1880, chapter 16, for the following reasons:

The plaintiff moves to strike out chapter 16, Acts of 1880, offered in evidence in this case and admitted subject to exception for the following reasons:

First. Because said act is irrelevant to the issue involved in this case.

33 Second. Because said act has been repealed as to the rate of tax upon the gross receipts of the defendant by chapter 59, Acts of 1890.

Third. Because there is no legally sufficient evidence in this case of a good and sufficient consideration moving from the defendant for the exemption claimed under the terms of said act.

Fourth. And because said act is invalid in law as a binding contract against the plaintiff.

GEORGE R. GAITHER, JR.,
Att'y for Pl'ff

But the court overruled said motion and exception, to which overruling of said motion and exception the plaintiff excepted, and prayed the court to sig*h* and seal this its first bill of exceptions; which is accordingly done on this 9th day of July, 1899.

J. UPSHUR DENNIS. [SEAL.]

The testimony on both sides having been closed, the plaintiff offered the following prayers:

Plaintiff's First Prayer.

The plaintiff prays the court to rule as a matter of law in this cas- that there is no legally sufficient evidence of a good and sufficient consideration on the part of the defendant company for the contract set forth in the Acts of 1880, chapter 16, offered in evidence by the defendant.

Plaintiff's Second Prayer.

The plaintiff prays the court to rule as a matter of law in this case that the provisions of the Act of 1880, chapter 16, imposing a tax of one-half per cent. upon the gross receipts of the defendant company have been repealed by the act of 1890, chapter 559, and that the State of Maryland is entitled to recover from the defendant company a tax of one per centum, as ascertained by the terms of the said act of 1890, upon the gross receipts of said company for the year ending on the thirty-first day of January, 1896.

Plaintiff's Third Prayer.

The plaintiff prays the court as a matter of law in this
31 case that by the terms of the acts of 1880, chapter 16, offered in evidence, there is no provision conferring upon said defendant company in clear and unmistakable terms an exemption from taxation upon its gross receipts at a greater rate than one-half of one per cent. upon the same.

And the defendant offered the following prayers:

Defendant's Prayer No. 1.

The defendant prays the court to rule as a matter of law that if the court, sitting as a jury, shall find from the admission of the parties and the evidence in the case that the act of assembly of Maryland of 1880, chapter 16, was duly accepted by the stockholders of the defendant company as required by said act, and the certificate of acceptance duly filed as therein required; and that the defendant company, since the passage of said act, has done all the things required of it to be done by said act, including the payment of one-half of one per cent. in each year, since the passage of said act up to the year ending January 31st, 1895, inclusive, upon the gross receipts of the defendant mentioned in said act of 1880, chapter 16, and that it tendered payment in the manner set forth in the correspondence offered in evidence by the defendant, of one-half of one per cent. upon said gross receipts for the year ending January 31st, 1896, then the plaintiff, said tender having been refused, as shown in said correspondence, cannot recover in this action any other sum than the amount so tendered, even although the court determine, as

matter of law, that said act of 1880, chapter 16, was repealed by the act of 1890, chapter 559, because the said act of 1880, chapter 16, was a valid and binding contract between the State of Maryland and the Northern Central Railway Company, and so protected by the Constitution of the United States from impairment by any legislation of the State of Maryland.

Defendant's Prayer No. 2.

The defendant prays the court to rule as matter of law: That if the court, sitting as a jury, shall find from the admissions of the parties and the evidence in the case, that the act of assembly of Maryland of 1880, chapter 16, was duly accepted by the stockholders of the defendant company as required by said act, and the certificate of acceptance duly filed as therein required, and that the defendant company, since the passage of said act, has done all the things required of it to be done by said act, including the payment of one-half of one per cent. in each year, since the passage of said act up to the year ending January 31st, 1895, inclusive, upon the gross receipts of the defendant mentioned in said act of 1880, chapter 16, and that it tendered payment in the manner set forth in the correspondence offered in evidence by the defendant, of one-half of one per cent. upon said gross receipts for the year ending January 31st, 1896; then the plaintiff, said tender having been refused, as shown in said correspondence, cannot recover in this action any other sum than the amount so tendered, because, even though the court should hold as matter of law that the said act of 1880, chapter 16, was not a contract within the protection of the Constitution of the United States, yet the said act of 1880, chapter 16, was not repealed by the act of 1890, chapter 559.

Thereupon the court refused to grant any of the plaintiff's prayers, and granted the defendant's first prayer, and refused to grant the defendant's second prayer.

To which refusal of the court to grant its prayers, and to the action of the court in refusing to grant each of said prayers of the plaintiff, and to the action of the court in granting defendant's first prayer, the plaintiff excepted, and prayed the court to sign and seal this its second bill of exceptions; which is accordingly done on this 9th day of July, 1899.

J. UPSHUR DENNIS. [SEAL.]

July 6, '99.

The foregoing bill of exceptions is correct.

BERNARD CARTER,
Att'y for Def't.

Appellant's costs	$26 45
Appellee's costs	6 90

STATE OF MARYLAND, } *To wit:*
City of Baltimore, }

I, Robert Ogle, clerk of the superior court of Baltimore city, do hereby certify that the aforegoing is truly taken from the record and proceedings of the said court in the therein-entitled cause.

In testimony whereof, I hereunto set my hand and
(Seal's place.) affix the seal of the superior court of Baltimore city aforesaid, on the 30th day of August, eighteen hundred and ninety-nine.

ROBERT OGLE,
Clerk Superior Court of Baltimore City.

36 Whereupon as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid, by the said State of Maryland above for error assigned, being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had, for that it appears to the court of appeals here, that there is error in the record of proceedings aforesaid, and also in the giving of the judgment aforesaid: Therefore it is considered by the court of appeals here, on this 10th day of January 1900 that the judgment aforesaid, given in form aforesaid be reversed with costs and cause remanded, and that the appellant recover its costs against the appellee as taxed, &c.

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

37 And on the same day and year last aforesaid, to wit, January 10th 1900, the following opinion of the court of appeals of Maryland, was filed to wit:

38 Court of Appeals of Maryland.

THE STATE OF MARYLAND }
vs.
THE NORTHERN CENTRAL RAILWAY COMPANY. }

SCHMUCKER, judge delivered the opinion of the court:

This appeal presents the interesting and important question whether so much of the act of 1880 ch. 16 as granted to the appellee an exemption from taxation on the gross revenues from its property in Maryland, beyond the annual rate of one-half of one per cent. was subject to repeal by subsequent legislatures. If it is determined that the act was subject to repeal then the further question
39 arises wether it was in fact repealed by the act of 1890 ch. 559 which imposed a tax of one per cent. per annum on the gross receipts of all railroads in the State operated by steam.

A proper consideration of the issues thus presented involves the ascertainment of the status of the appellee in reference to liability for taxation prior to the passage of the act of 1880, the nature and operation of that act and the operation and effect of the act of 1890

as a repeal of so much of the act of 1880, as granted to the appellee a partial exemption from taxation.

It may assist us in arriving at a clear understanding of the case to review briefly the corporate history of the appellee.

40 The act of 1827, ch. 22, incorporated the Baltimore & Susquehanna Railroad Company to operate a railroad from Baltimore to the Susquehanna river and conferred upon it immunity from taxation.

By the act of 1854, ch. 250, the stockholders of Baltimore & Susquehanna Railroad Company were authorized to unite and consolidate with three Pennsylvania corporations, which were then operating connecting railroads, so as to form one corporation to be called "the Northern Central Railway Company" on such terms and conditions and in accordance with such regulations and agreements as the several companies might adopt. Similar authority for

41 the consolidation on the part of the Pennsylvania corporations having been procured from the legislature of that State, articles of union were executed by all of the corporations by which among other things they transferred to the new company the property, rights, privileges and immunities which had theretofore belonged to the several old companies. It is not necessary to state in fuller detail the various terms of this consolidation or the transaction by means of which it was accomplished for the legal operation and effect of it upon the liability to taxation of the new corporation, which is the present appellee, has been carefully considered and passed upon by this court in the case of The State *vs.* The Northern Central Railway Co. 44 Md. 131 which will be referred to more at large hereafter.

42 The appellee enjoyed the exemption of its property in Maryland from taxation thus secured to it by the act of 1854 down until 1866 when the legislature passed a general assessment law which provided for the assessment of all property in the State, and also repealed in general terms all laws exempting property from taxation. The act of 1870 ch. 362, also contained a clause repealing "every provision contained in the charter, or supplements thereto, of every railroad company incorporated by the laws of this State or contained in any law heretofore passed by the legislature of this State whereby the stock or property real or personal of any railroad company * * * is exempted from taxation." Then fol-

43 lowed the act of 1872 ch. 234 which imposed a tax of one-half per centum annually upon the gross receipts of steam railroads.

Under the last-mentioned law a tax was levied on the appellee of one-half per cent. of the gross receipts of its *of its* Maryland property for part of the year 1872 and all of the year 1873. This tax the appellee refused to pay and the State brought suit to recover it and the judgment being against the State it brought the case here on appeal and it is reported in 44 Md., 131. This court held the appellee to be liable for the tax and reversed the judgment of the lower court. In deciding that case it became

necessary for this court to examine carefully into the corpo-
41 rate history and legal status of the appellee and to consider and pass upon all of the legislation to which we have referred which had been enacted, as well as the transactions of the four former corporations incident to their consolidation into the Northern Central Railway Company.

The court in its opinion in that case announced a number of conclusions which have a material bearing upon the case at bar. They are as follows:

First. That the appellee was created and derived its existence from the act of 1854 ch. 250, and was in no sense created by the articles of union executed by the several consolidating corporations from the union of which it sprung.

45 Secondly. That the rights and privileges including exemptions from taxation granted to the Baltimore and Susquehanna Railroad Co. by the act of 1827 were, in the consolidation of the four companies, conferred on the appellee not by transfer from the Baltimore and Susquehanna Railroad Company but as new and special grants under the act of 1854 which created the appellee as the new corporation.

Thirdly. The constitution of 1850 having been in operation when the act of 1854 was passed and the exemption from taxation having been part of the charter granted, by that act, to the appellee, the power of the legislature to repeal or revoke the exemption
46 thus granted whenever in its judgment the public interest required it was too clear to be questioned.

Fourthly. The general assessment law of 1866 and the act of 1870, ch. 362, contains a plain and unambiguous expression by the legislature of its intention to repeal this exemption and those acts in fact accomplished its repeal.

Fifthly. The act of 1872, ch. 234, imposing an annual tax of one-half per cent. upon the gross receipts of steam railways was a valid exercise of the taxing power of the State and the appellee was liable thereunder to the tax at that rate on the gross receipts from its property in Maryland.

After the case had been remanded by the decision in 44th
47 Md., and before it had been retried in the lower court, the act of 1880 ch. 16 was passed. This act is described in its preamble as one to adjust and finally settle by agreement the pending tax controversies between the State and the company by making the latter thereafter liable to taxation to a certain extent and providing for the payment of certain indebtedness claimed by the State from the company and it is declared to be "An act supplementary to the act of eighteen hundred and fifty-four chapter two hundred and fifty" which was held by this court in 44th Maryland to constitute the charter of the appellee. No further change in the situation occurred until the State by the act of 1890 ch. 559 raised the annual rate of tax upon the gross receipts of steam rail-
48 road companies to one per cent. The appellee paid the increased rate of tax, upon the gross receipts of its property in Maryland under protest until 1896 when it refused to do so any

longer and the present suit was brought to recover the tax for the year 1896. The case was tried before the court below without a jury and the judge by his ruling on the prayers held that the act of 1880 constituted a contract irrepealable without the consent of the appellee, by which it was exempted from paying more than one-half per cent. tax upon its gross revenues and he rendered a verdict and entered up judgment accordingly from which the State appealed.

This brings us to the consideration of the most important
49 question presented by this appeal, that is, whether the passage by the legislature of the act of 1880 and its acceptance by the appellee constituted a contract between it and the State which it was beyond the power of the legislature to repeal or impair.

The act of 1880 is declared upon its face to be supplemental to that of 1854 and it grants to the appellee the partial exemption from taxation in almost the identical words in which the former act granted the complete exemption. The practical effect of the latter act upon the prior one which the charter of the appellee was to so amend it as to substitute the partial for the complete exemption.

The same constitutional provision t-uching the formation of
50 corporations which provided that all laws passed in pursuance thereof should be subject to alteration or repeal was in force when each of the two laws was passed. If by reason of this provision of the constitution it was not competent for the legislature to grant to the appellee an irrepealable exemption from taxation by the act of 1854 which constituted its charter, it cannot be successfully contended that the legislature could make a valid grant of such an exemption by an act, passed in 1880, which was supplemental to or amendatory of the former act, unless the feature which we shall hereafter notice in the act of 1880 so distinguishes it from the laws contemplated by the section of the constitution to which we have referred, as to take it out of
51 the operation of that section. This court in the opinion in the case in 44th Md. in commenting upon the effect of the constitution of 1850 upon the act of 1854, say: "In accepting the act of 1854 and in the execution of the articles of union under the operation of which the Baltimore and Susquehanna railroad has merged and ceased to exist, the stockholders are presumed to have known that the corporate powers and privileges granted by that act to the Northern Central Railway Company were subject to the provisions of sec. 47 art. 3, of the constitution and that the exemption from taxation claimed under that act was liable to be repealed by the legislature whenever in its judgment the public interest
52 required it. Be that however as it may it was not within the power of the legislature under the constitution of the State to grant to the appellee immunity from taxation or any other corporate privilege beyond the power of a subsequent legislature to repeal or revoke." It is to be observed that the court does not rest the inability of the legislature to grant to a corporation an irrepe-able exemption from taxation, upon the form or character of the particular statute then under consideration but puts it upon the

broad ground of want of power in the legislature under the constitution, to make such a grant at all. The court certainly in effect determines that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to and is therefore subject to alteration or repeal by future legislatures.

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If this construction of the constitution be correct, how can we escape the conclusion the legislature of 1880 had no greater power, by the passage of the act upon which the appellee bases its claim to a partial exemption from taxation, to grant that exemption in a irrepealable form, that the legislature of 1854 had to grant a total exemption in like form by the act which it passed and which this court has held to be subject to repeal at any time? The appellee attempts to answer this query by calling attention to the fact that the act of 1880 differs from that of 1854 in the essential particular that it, upon its face and especially in its preamble, professes to have been passed for the purpose of adjusting and settling by agreement the controversies which were then pending between the State and the appellee in reference to the extent and validity of the claims of the latter to exemption from taxation, and that the contents of the act itself show that the appellee in accepting it and complying with its terms gave up a valuable right of appeal to the United States Supreme Court, and paid a large sum of money to the State thus supplying a valid consideration which made the action of the State binding and permanent. Without going into the contents of the act in detal or fully reciting the things done upon the faith of it by the appellee it may be conceded that, if there were no constitutional difficulty in the way, the transaction between the State and the appellee as part of which the act of 1880 was passed was one so far in the nature of a contract or agreement that neither party could abrogate it without the consent of the other.

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The difficulty with the appellee's contention is that the inability of the legislature under the constitution to make in 1880 a valid and irrepealable grant of such a corporate privilege as immunity from taxation did not rest upon the want of a sufficient consideration for the grant but upon the fundamental want of power in the legislature to make it by reason of the provisions of the constitution which is the supreme and controlling law of the land. It is plain therefore that the question of consideration *vel non* cannot be a controlling one in determining the question now at issue. If as this court has decided in 44 Md. the appellee in executing the articles of union under the act of 1854 must be presumed to have known that the privileges granted by that act were subject to the provisions of the constitution and repealable at any time, so must the appellee in accepting the provisions of the act of 1880 be presumed to have known that the immunity from taxation granted by that act was in like manner and for the same reasons subject to repeal by future legislatures.

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57 If the act of 1880 had been passed prior to the adoption of the constitution of 1850, we would under the decisions of this court in Tax Cases, 12 G. & J. 117; The State *vs.* The B. & O. R. R. Co., 48 Md. 71; The State *vs.* The Northern Central R. R. Co. 44 Md., at pg. 162 and The County Commissioners *vs.* A. & E. R. R. Co., 47 Md. 611, and of the United States Supreme Court in Miller *vs.* The State, 15 Wal. 448, and other cases, have been compelled to uphold its validity beyond the power of subsequent legislatures to repeal or impair even though its operation would be to tie the hands of all future legislatures and practically alienate the sovereign right of taxation, but in view of the language already referred to
58 used by the court in 44 Md., the privilege of partial immunity from taxation conferred on the appellee by the act of 1880 must be held to have been subject to repeal by subsequent legislatures.

The question remaining for consideration is whether the act of 1890, ch. 559, repealed the exemption from taxation claimed by the appellee under the act of 1880. We think that the exemption was so repealed both because the language of the repealing clause contained in the later act was broad enough to cover it and because of the plain inconsistency of the provisions of the two acts. The act of 1890 declares that the tax thereby provided for shall be levied annually upon the gross receipts of "all railroad companies
59 whose roads are worked by steam incorporated by or under the authority of this State, &c., * * * and doing business in this State." And it requires "each and every railroad company" to annually make report under oath of its gross revenues and transmit the amount of the tax to the comptroller, and provides that "if any officer of any such corporation or company" shall make a false statement in such report he shall be guilty of perjury. The repealing clause of the act repeals "all acts or parts of acts in conflict herewith." The language thus used by the legislature plainly indicates a purpose to apply a uniform rate and method to the taxation of all steam railroads within the State and to repeal, so far as it could, all prior laws which interfered with the consummation of that purpose.

60 Apart from the express repeal of all inconsistent laws by the act of 1890 the scheme and purpose of that act, as gathered from the comprehensive expressions used in describing the subjects of its operation are entirely inconsistent with those of the provisions of the act of 1880 which, if they remained in force would exclude the appellee from the operation of the later act.

The subject of the implied repeal of an existing law by the enactment of a later one whose provisions are inconsistent with it has frequently been the subject of consideration by this court, and the substance of its conclusions has been well stated by the former
61 Chief Judge Alvey in The W. M. R. R. Co. *vs.* The Appeal Tax Court, 50 Md. 296 as follows: "The general doctrine on the subject of implied repeals is that when there are two acts on the same subject both are to be given effect if possible. If however the two acts are plainly repugnant to each other in any of their pro-

visions the later act without any repealing clause will operate to the extent of the repugnancy as a repeal of the first; and even where the two acts are not in express terms repugnant yet if the later act covers the whole subject of the first and embraces new provisions showing that it was intended as a substitute for the first act it will operate as a repeal of that act."

62 Tested by the principles thus laid down the act of 1890 which by its express terms imposes a tax of one per cent. upon the gross receipts of all railroads worked by steam within the State must be held to be so inconsistent with that part of the act of 1880 which provides that the appellee shall not pay a greater tax upon its gross receipts than one-half of one per cent., as to effect a repeal thereof.

If we were in doubt as to the legal operation of the act of 1890 upon that of 1880 and thought it equally susceptible of either of the two constructions contended for, it would be our duty to adopt the construction which would tend (to effectuate rather than the one which would tend) to defeat the intention of the constitution that

63 taxation should be fair and equal in proportion to the value of the property assessed. Such a construction of the provisions of the later of the two acts now under consideration would require us to hold that they repeal the exemption from taxation granted to the appellee by the former one.

It follows from what we have said that the judgment appealed from must be reversed and the case remanded.

Filed January 10th 1900.

Opinion, &c., remanded to the superior court of Baltimore city, on the 30th day of January, A. D. 1900.

64 *Record.*

In the Court of Appeals of Maryland.

THE NORTHERN CENTRAL RAILWAY COMPANY
vs.
THE STATE OF MARYLAND. } No. —.

Appeal from the superior court of Baltimore city.

Bernard Carter, for appellant.
Att'y Gen'l Rayner, George R. Gaither, Jr., for appellee.

Filed September 26th, 1900.

65 Appeal from the superior court of Baltimore city.

First appeal in this case was to October term, 1899, and transcript made and sent by mail Sept. 14th, 1899.

Docket Entries.

January 13th, 1900.—Opinion of court of appeals (Judge Schmucker) reversing the judgment appealed from and remanding case and certificate of clerk, f'd.

June 18, 1900.—Motion by plaintiff to amend declaration by making the amount claimed $20,000.00, instead of $16,000.00 and leave granted and amendment made.

June 18, 1900.—Case tried before Hon. Henry Stockbridge, judge at large without the intervention of a jury.

June 18, 1900.—Verdict for plaintiff for $17,124.17, judgment on verdict.

Defendant's Bill of Exceptions.

Filed June 18th, 1900.

At the trial of the above-entitled case the plaintiff offered in evidence the certificate of the comptroller of the State of Maryland, setting forth the indebtedness of the defendant, as follows:

(NOTE.—The certificate of the comptroller herein called for is annexed to the account filed with the declaration, hereinbefore inserted.)

The plaintiff then offered in evidence the act of assembly of Maryland of 1890, chapter 559.

And read therefrom the following portions of said act, which it was agreed between counsel for the respective parties were all the provisions of said act pertinent to the questions involved in this case:—

An act to provide for State taxation on the revenues of railroad, telegraph or cable, express or transportation, telephone, parlor car, sleeping car, safe deposit, trust, guarantee, fidelity oil or pipe line, title insurance, electric light or electric construction companies incorporated under any general or special law of this State and doing business therein.

SECTION 1. Be it enacted by the General Assembly of Maryland, That a State tax of one per centum be and is hereby levied annually upon the gross receipts of all railroad companies worked by steam incorporated by or under the authority of this State and doing business therein; a State tax of one per centum is hereby levied annually upon the gross receipts of every telegraph or cable
66 express or transportation company incorporated under any general or special law of this State and doing business therein; a State tax of two per centum is hereby levied annually upon the gross receipts of all telephone, parlor car, sleeping car, safe deposit, trust, guaranty and fidelity companies incorporated under any general or special law of this State and doing business therein; a State tax of one per centum is hereby levied annually upon the gross receipts of all oil or pipe line companies and all title insurance companies incorporated under any general or special law of this State and doing business therein, and one-half of one per centum upon the annual gross receipts of all electric light or electric construction companies incorporated under any general or special law of this State and doing business therein; if any such

railroad company has part of its road in this State and a part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road together with a statement of the whole length of its line in this State, and such company shall pay to the State at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line, and similar statements shall be made by each oil or pipe line company and each sleeping car, parlor car, express, transportation or cable company, so that the proportion of said gross earnings of said companies respectively accruing from their business within this State may be accurately ascertained or said ascertainment may be made in any other mode satisfactory to the State tax commissioner; the said gross-receipt taxes shall be due and payable at the treasury on or before the first day of July in each year.

SEC. 2. And be it enacted, That it shall be the duty of each and every such corporation or company so doing business in said State on or before the fifteenth day of April next, and on or before the fifteenth day of April in each and every year thereafter to make a report under oath of its president, treasurer or other proper officer, to the State tax commissioner showing its total receipts or revenues accruing from business done in this State for the year ending on the preceding thirty-first day of January, and it shall be the duty of the State tax commissioner to file such report in his office, and on or before the first day of June next, and on or before the first day of June in each and every year thereafter, to calculate the State tax due from such corporation or company on its gross receipts or revenues aforesaid for such year, and to transmit the amount of such State tax to the comptroller of the treasury, to be collected and received into the State treasury as other State taxes are received into the treasury of this State.

* * * * * * *

SEC. 6. And be it enacted, That if any such corporation or company from whom such taxes shall be due and payable on its gross receipts and revenues as aforesaid, shall fail or neglect to pay the same to the treasurer of the State for the space of one month after the same shall be due and payable as aforesaid, such corporation or company shall for such failure or neglect forfeit and pay to the State of Maryland an additional amount of five per cen-
67 tum as penalty or damages, to be added to the said taxes so due and unpaid, and it shall be the duty of the comptroller to add the same to the said account, and forthwith to make out said account and certify the same under the seal of his office, and to cause suit to be brought for said taxes in the circuit court for the county where the principal office of such corporation or company is located, or in the superior court of the city of Baltimore the court of common pleas or the Baltimore city court, if such principal office be located in the said city, and the said suit shall stand for trial at the first term after the service of the writ shall have been made on such corporation or company, and service of the writ aforesaid on any officer,

agent or employee of said corporation or company, shall be deemed and taken as sufficient service of such company.

SEC. 7. And be it enacted, That if upon the return of the writ issued against such corporation or company, and the said corporation or company being duly summoned as aforesaid, such corporation or company shall fail to appear by attorney or agent upon the first call of the docket, it shall be the duty of court to cause the personal appearance of said corporation or company to be entered, and the cause shall stand for trial or hearing and shall proceed and judgment shall be rendered as if such corporation or company had appeared by attorney, and if such corporation or company shall appear by attorney or agent, and either party shall desire or require a trial by jury, it shall be the duty of the court to cause issues to be framed, and a jury to be empaneled for the trial thereof, and if the verdict of the jury shall be for the State, judgment shall be entered with stay for the amount of taxes so due as aforesaid, and the five per cent. additional as damages with interest and costs, and a fee of fifty dollars shall be allowed the attorney for the State to be taxed in the plaintiff's costs in said suit, and execution shall be issued on such judgment if the same be not paid into the treasury within thirty days after the rendition thereof.

SEC. 8. And be it enacted, That the certificate of the comptroller under the seal of his office, of the amount of taxes so due as aforesaid, and of the said penalty or damages shall be *prima facie* evidence to entitle the State to judgment for said amount of State taxes, and said penalty or damages in any case in which suit may be brought for the recovery of such State taxes as aforesaid.

SEC. 9. And be it enacted, That this act shall take effect from and after the date of its passage, and all acts or parts of acts in conflict herewith be, and the same are hereby repealed.

Approved April 8th, 1890.

The plaintiff having closed its testimony, the defendant, to support the issues on its part, offered in evidence, the Acts of Assembly of Maryland of 1854, chap. 250, and read the same, which said act is as follows:

CHAPTER 250.

An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company, by the name of the Northern Central Railway Company.

68 SECTION 1. Be it enacted by the General Assembly of Maryland, That the stockholders of the Baltimore and Susquehanna Railroad Company be, and they are hereby authorized upon their expressing their assent to and accepting this act, to unite and to consolidate their company or corporation with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company and the Susquehanna Railroad Company in the State of Penn-

sylvania, so as to form and constitute one company or corporation, to be called the Northern Central Railway Company, on such terms and conditions, and conformably to such agreements and regulations as the said several companies shall respectively determine and adopt, subject nevertheless to the following general provisions: First, that all existing contracts, engagements and liabilities of the said Baltimore and Susquehanna Railroad Company shall continue to bind said company and its property as fully as before the consolidation herein above authorised, or that the said existing, contracts, engagements and liabilities shall be duly adopted and assumed by the consolidated company except as herein expressly altered or rescinded; second, that all laws heretofore made in reference to the said Baltimore and Susquehanna Railroad Company, and not repealed or modified by the legislature of Maryland, and all ordinances relating to said company heretofore made and not repealed by the mayor and city council of Baltimore, shall be binding and operative upon the said consolidated company, so far as its property or its operations may be, within the jurisdiction of the State of Maryland or the city of Baltimore respectively, and so far as the said laws or ordinances may be applicable to, and consistent with the new organization of the said consolidated company; third, that the consolidated company shall have power from time to time to establish its capital stock at an amount not exceeding eight millions of dollars, the same to be represented by such number of shares as the said consolidated company shall have power to issue their bonds convertible into stock on such terms as the company may prescribe, and to secure the same by one or more mortgages, for any such amounts as they may find necessary for paying off any existing debt or engagement of the company, completing the road to Sunbury, stocking the road, laying a double track on the same or any part thereof, and for extending their road to tide water, and constructing such docks and other fixtures as they may find necessary. Fourth. That the said consolidated company shall annually elect at such time and place as shall be appointed and required by the by-laws of the company, twelve directors, who together with such additional directors as may be appointed in conformity with this act, by the State of Maryland and the city of Baltimore, so far as such legislature shall not impair the due representation of the State of Maryland, and the city of Baltimore, or either of them in the same, and their appointment of said directors, as is hereinafter provided. Fifth. That in the direction of the said consolidated company, the city of Baltimore shall be entitled to appoint two directors in the board of said consolidated company whenever, and as long as said city shall hold not less than two hundred thousand dollars of the stock therein valued at its par value; and one director so long as the said city shall hold one hundred thousand dollars of the said
69 stock va*l*ued as aforesaid, and less than two hundred thousand dollars in the same; and that the State of Maryland shall in like manner, whenever, and as long as it may hold stock in the said consolidated company be entitled to appoint the same number of directors in said company under the like conditions and re-

strictions, the said director or directors of the State of Maryland or city of Baltimore respectively, whenever appointed, to be in addition to the directors hereinbefore mentioned and allowed in the constitution of the board. Provided, that this clause shall not be understood to deprive either the State of Maryland, or the city of Baltimore, of the right to vote as other stockholders of said company upon any stock, either the State or city may at any time hereafter hold in said company, above the amount of two hundred thousand dollars, estimated at its par value in the capital stock of the same (if the State or city at any time appoint such directors,) shall constitute the board for the management of the affairs of the company; which board shall annually elect a president to preside over the company, and a majority of said board shall constitute a quorum: and the president and directors shall have power to appoint all necessary officers, to regulate their salaries, and to make such by-laws as they deem necessary for the government of the company; that the company shall make and use a common seal, and possess all the corporate powers and privileges, and be subject to all the duties and obligations not inconsistent with this act, and its general intent, which are expressed in the charter heretofore granted to the said Baltimore and Susquehanna Railroad Company, and its supplements; provided, that this clause shall not be construed to deprive the parties to the said consolidated company of the right or authority to make such provisions and regulations, notwithstanding said original charter and its supplements, as may be necessary to create and establish said consolidated company, and bring its organization into agreement and consistency with the terms and conditions of the charter of the several companies of which the said consolidated company shall be composed; and provided also, that the parties to the consolidated company shall be authorized and empowered to adopt and conform the organization of the said consolidated company to such provisions or enactments as may be required by the legislature of the State of Pennsylvania, touching the name of said corporation, and the construction of the board of president and directors in said consolidated company, and the conditions relating to their appointments.

SEC. 2. And be it enacted, That this act shall take effect whenever, and as soon as the said parties hereinbefore referred to shall have agreed to consolidate their several companies into one, and shall have settled, determined and agreed upon the terms and conditions of such consolidation in conformity with the provisions of this act, and shall make a full record and report thereof, certified by the president of said consolidated company, and have transmitted the same to the governor of Maryland, to be recorded and preserved in the office of the secretary of state; a copy of which record duly authenticated, under the seal of the secretary of state, shall be evidence thereof in all courts of justice.

70 The defendant then offered in evidence, the act — assembly of Maryland of 1880, chapter 16, and read the same, which said act is as follows:

An act to adjust and settle finally, by agreement, all pending controversies between the State of Maryland and the Northern Central Railway Company, by subjecting the franchises and property of said company within the State to taxation for State purposes to a certain extent, and by providing for the payment of a certain indebtedness claimed by the State of Maryland to exist on the part of said Northern Central Railway Company to said State of Maryland, being an act supplementary to the act of eighteen hundred and fifty-four, entitled An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Rail—— Company, and the Susquehanna Railroad Company, by the name of the Northern Central Railway Company.

Whereas, a controversy has arisen and exists between the State of Maryland and the Northern Central Railway Company in reference to the rights of the State of Maryland to subject to taxation the franchises and property of the Northern Central Railway Company, the said company claiming exemption of the same from taxation upon the grounds that among the terms and conditions of the union and consolidation of the several companies by which said Northern Central Railway Company was formed is one, that the latter should have all the rights, privileges and immunities of each of said companies, which said terms were entered into under the authority given by the act of Maryland of eighteen hundred and fifty-four, chapter two hundred and fifty, which moreover declared that said Northern Central Railway Company should have all the powers and privileges expressed in the charter granted by the State of Maryland to the Baltimore and Susquehanna Railroad Company among which privileges was immunity from taxation.

And whereas, the State of Maryland having, by the act of eighteen hundred and seventy-two, chapter two hundred and thirty-four, and the act of eighteen hundred and seventy-four, chapter four hundred and eight imposed an annual tax of one-half of one per centum on the gross receipts of all railroad companies worked by steam incorporated by or under the authority of the said State of Maryland, and claiming that under said acts the gross receipts of said Northern Central Railway Company are liable to said tax, have instituted suits to recover the same.

And whereas, the property of said company has been also assessed as liable to taxation for county and municipal purposes.

And whereas, the said company has the right to have the question at issue between it and the State of Maryland carried to the Supreme Court of the United States to be there decided.

And whereas it has been represented to this General Assembly that what would be the ultimate decision of said question is a matter of great doubt, and it is deemed to be moreover just and proper that an equitable settlement should be made of the matters so in
71 controversy and it having been represented to this General Assembly that the said Northern Central Railway Company, for the purpose of making such settlement, is willing to pay a tax

of one-half of one per centum on the gross receipts within this State, upon the terms and conditions hereinafter set forth; now therefore—

SECTION 1. Be it enacted by the General Assembly of Maryland, That the Northern Central Railway Company shall have and possess all the powers, rights, privileges and immunities, and be subject to all the duties and obligations which are expressed in the act of assembly of Maryland of eighteen hundred and twenty-seven, chapter seventy-two, entitled An act to incorporate the Baltimore and Susquehanna Railroad Company, but all the franchises and property of every description and gross receipts of said Northern Central Railway Company, within the State of Maryland, shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon the gross receipts from its railroad and branches lying within the State of Maryland, and from all other sources within this State, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland; provided, however, that all such property, works and structures of the said Northern Central Railway Company, which are or may be taxable within the meaning of the decision of the court of appeals of Maryland rendered in the year eighteen hundred and seventy-eight in the case of the State of Maryland against the Baltimore and Ohio Railroad Company, shall be subject to taxation for county and municipal purposes in the same way and to the same extent as the property of individuals.

SEC. 2. And be it further enacted, That this act shall not take effect until the said The Northern Central Railway Company shall have paid to the treasurer of the State of Maryland the sum of twenty-nine thousand seven hundred and sixty-two dollars and fifty-six cents, as mentioned in the third section of this act, nor until this act and all its provisions shall have been accepted in the mode prescribed in the fourth section hereof.

SEC. 3. And be it further enacted, That the payment of the sum of twenty-nine thousand seven hundred and sixty-two dollars and fifty-six cents mentioned in the second section of this act shall be made by said Northern Central Railway Company to the treasurer of the State of Maryland, on or before the first day of July, eighteen hundred and eighty, and the said treasurer shall receive said sum from said company; and the said sum of twenty-nine thousand, seven hundred and sixty-two dollars and fifty-six cents, when so paid, is hereby declared to be in full satisfaction and discharge of all claims arising under the laws of the State of Maryland for taxes against said company up to December thirty-first, eighteen hundred and seventy-nine, saving and excepting taxes for municipal and county purposes upon the property mentioned in the proviso to the first section of this act.

SEC. 4. And be it further enacted, That the acceptance of this act mentioned in the second section thereof shall be made by the stockholders of said Northern Central Railway Company at a general meeting of the same, the acceptance to be evidenced by an instrument of writing under the corporate seal of said

72

company, which shall be filed in the office of the secretary of state of Maryland.

SEC. 5. And be it further enacted, That upon the compliance of said Northern Central Railway Company with the provisions of the third and fourth sections of this act, all claims against said Northern Central Railway Company for taxes assessed under any law of the State of Maryland and unpaid by it up to December thirty-first, eighteen hundred and seventy-nine, except municipal and county taxes upon the property mentioned in the proviso to the first section of this act, are hereby declared to be discharged, and all suits or other proceedings heretofore instituted for the enforcement of the payment by said Northern Central Railway Company of taxes shall be dismissed and abandoned on the payment of costs by said company.

SEC. 6. And be it further enacted, That this act shall take effect from the date of its passage, subject nevertheless to all the conditions and limitations in reference to the provisions of said act which are therein set forth.

Approved February 25, 1880.

The defendant then read the following agreement of counsel:

It is agreed in this case, subject to any objection which may be made by the plaintiff as to its relevancy, as follows:

1. That the sum of $29,762.50, mentioned in the act of assembly of Maryland of 1880, chapter 16, was paid to the treasurer of the State of Maryland before the first day of July, 1880, in accordance with the requirements of the said act of assembly.

2. That the said act of assembly was duly accepted by the stockholders of the Northern Central Railway Company at a general meeting of the said stockholders; and that the said acceptance was evidenced by an instrument of writing under the corporate seal of the said company, which was filed in the office of the secretary of state, before the 1st day of July, 1880. And that the said company from and after the passage of said act paid in each year ½ of one per cent. on its gross receipts described in said act, up to and including the year ending December 31, 1889, under the terms of the act of 1874, chap. 408.

GEORGE R. GAITHER, JR.,
Att'y for Pl'ff.

BERNARD CARTER,
Att'y for Def't.

The defendant then offered in evidence a certificate of the docket entries of cases Nos. 59 and 60 in the October term, 1875, of the court of appeals of Maryland, brought by the State of Maryland against the Northern Central Railroad Company, in which cases the judgments of the superior court of Baltimore city in favor of the said company were reversed by the court of appeals, and a new trial ordered by the court on the 2d day of March, 1876; being the case reported in 44 Md. p. 131, also the docket entries in said case in

the superior court for Baltimore city, after its remand by the
73 court of appeals showing that no new trial had taken place in said cases, and that said cases were pending in January, 1880.

The defendant also proved by competent testimony that from the time of the passage of the act of 1880, chapter 16, up to and including the year 1890, the defendant paid in each year one-half of one per cent., on its gross receipts from its railroads and branches lying within the State of Maryland, and from all other sources within said State.

The defendant further proved that after the passage of the act of assembly of Maryland of 1890, chapter 559, the defendant in the years 1891, 1892, 1893, 1894 and 1895 paid to the State of Maryland for each of said years a tax of one per cent. on its gross receipts above mentioned, but in making each of said payments, accompanied the same with a declaration that in making said payments it in no way waived the right granted to it by the act of assembly of Maryland of 1880, chapter 16, to pay a State tax of one-half of one per cent. on its gross receipts and paying said tax, to be relieved of all other taxes whatsoever, State, county or municipal, except as stated in said act of 1880, chapter 16. The form of said declaration as made at the time of the payment of said tax for the year 1895, was as follows: (The same form *mutatis mutandis* having been used in the previous years.)

"The Northern Central Railway Company, in calculating the tax on its gross receipts at the rate of one per cent., such being the rate fixed by the act of assembly of Maryland, 1890, chapter 559, for the rate of State tax on the gross receipts of steam railroads, and in paying the amount arrived at by said calculation, in no way waives, or is to be understood as waiving, the right granted to it by the act of assembly of Maryland of 1880, chapter 16, to pay a State tax of one-half of one per cent. on its said gross receipts, and paying said tax, to be relieved of all other taxes whatsoever, State, county or municipal, except as stated in said act of 1880, chapter 16, but on the contrary, insists and relies upon all the rights of exemption given to it by said act of 1880, chapter 16; it makes payment in this year 1895, as it did in the years 1891, 1892, 1893 and 1894, of tax on its gross receipts of an additional one-half of one per cent. over and above what it is required by law to make, as a voluntary contribution towards the revenue of the State, the said payments for said years, not hereafter to be continued, unless by the voluntary act of the said company."

The defendant further proved by competent testimony that on the 26th day of June, 1896, the defendant tendered to the treasury department of the State of Maryland the sum of six thousand, five hundred and seventy-one dollars and seventeen cents, which was one-half of one per cent. on the gross receipts of the defendant from its railroads and branches lying within the State of Maryland, and from all other sources within the State, as the amount payable by it on its gross receipts for the year ending January 31st, 1896, and ac-

companied the said tender with a letter to the treasurer of the State of Maryland, dated June 26th, 1896, which letter is as follows:

74 Northern Central Railway Company, office of the auditor.

BALTIMORE, *June* 26, 1896.

Thomas J. Shryock, Esq., treasurer State of Maryland.

DEAR SIR: Referring to bill sent by the department to the Northern Central Railway Company for the amount payable by it for the gross-receipts tax for the year ending January 31, 1896, I beg respectfully to say that the bill is made out on the basis of one per cent. upon the amount of the gross receipts in the State of Maryland, whereas under the act of 1880, chapter 16, this company is only required to pay one-half of one per cent. instead of one per cent.; the bill therefore should be made out upon the basis of one-half of one per cent. instead of the basis of one per cent.

For several years past, the N. C. R'y Company has been paying at the rate of one per cent. but in doing so, stated on the face of the return of gross receipts made to the comptroller, as follows:

"The Northern Central Railway Company in calculating the tax on its gross receipts at the rate of one per cent. such being the rate fixed by the act of assembly of Maryland, 1890, chapter 559, for the rate of State tax on the gross receipts of steam railroads, and in paying the amount arrived at by said calculation in no way waives, or is to be understood as waiving the right granted to it by the act of assembly of Maryland of 1880, chapter 16, to pay a State tax of one-half of one per cent. on its said gross receipts, and paying said tax to be relieved of all other taxes whatsoever, State, county or municipal, except as stated in said act of 1880, chapt. 16, but on the contrary insists and relies upon all the rights of exemption given to it by act of 1880, chap. 16, it makes payment in this year of taxes on its gross receipts of an additional one-half of one per cent. over and above what it is required by law to make as a voluntary contribution towards the revenue of the State, the said payments of said years not hereafter to be continued unless by the voluntary act of the said company."

The payment of this rate was made voluntary by the company, the rate imposed on other Cos. being one per cent. but as the rate upon gross receipts has been so largely increased under the new law, the company has determined to pay only the sum which by the act of 1880, ch. 16, — is required to pay, which is the one-half of one per cent.

Yours truly,

(Signed) J. P. KERR, *Auditor.*

The defendant received in reply the following letter from the comptroller of the State of Maryland:

STATE OF MARYLAND:

Treasury department, comptroller's office.

ANNAPOLIS, *July* 31*st*, 1896.

J. P. Kerr, Esq., auditor Northern Central Railway Co., Baltimore city, Md.

MY DEAR SIR: Your letter of June 26th, '96, enclosing
75 draft in favor of the State of Maryland for $6,571.17, was duly received and contents carefully noted, and afterwards referred to H. M. Clabaugh, attorney general of the State for his opinion, etc.

In reply I beg leave to say that I cannot receive your draft for above amount, nor any draft for a less amount than the full 1% on gross receipts of your railway; and I herewith return the draft forwarded by you to this office for $6,571.17.

Unless payment of the 1% on gross receipts is made by the Northern Central Railway Co. to the State of Maryland, suit for collection of the same will be entered against said Co.

Most truly yours,

ROBERT P. GRAHAM, *Comptroller.*

The defendant further proved by competent testimony, that from the passage of the act of 1880, chapter 16, the defendant complied with all the provisions of said act.

The defendant thereupon closed its testimony.

The testimony on both sides having been closed, the defendant offered the following prayers:

Defendant's Prayer No. 1.

The defendant prays the court to rule as a matter of law that if the court, sitting as a jury, shall find from the admission of the parties and the evidence in the case that the act of assembly of Maryland of 1880, chapter 16, was duly accepted by the stockholders of the defendant company as required by said act, and the certificate of acceptance duly filed as therein required; and that the defendant company, since the passage of said act, has done all the things required of it to be done by said act, including the payment of one-half of one per cent., in each year, since the passage of said act up to the year ending January 31st, 1895, inclusive, upon the gross receipts of the defendants mentioned in said act of 1880, chapter 16, and that it tendered payment in the manner set forth in the correspondence offered in evidence by the defendant, of one-half of one per cent. upon said gross receipts for the year ending January 31st, 1896, then the plaintiff, said tender having been refused, as shown in said correspondence, cannot recover in this action any other sum than the amount so tendered, even although the court determine, as a matter of law, that said act of 1880, chapter 16, was repealed by the act of 1890, chapter 559, because the said act of 1880, chapter 16, was a valid and binding contract between the

State of Maryland and the Northern Central Railway Company, and so protected by the Constitution of the United States from impairment by any legislation of the State of Maryland.

Defendant's Prayer No. 2.

The defendant prays the court to rule as a matter of law, that if the court, sitting as a jury, shall find from the admissions of the parties and the evidence in the case, that the act of assembly of Maryland of 1880, chapter 16, was duly accepted by the
76 stockholders of the defendant company as required by said act, and the certificate of acceptance duly filed as therein required, and that the defendant company, since the passage of said act, has done all the things required of it to be done by said act, including the payment of one-half of one per cent. in each year, since the passage of said act up to the year ending January 31st, 1895, inclusive, upon the gross receipts of the defendant mentioned in said act of 1880, chapter 16, and that it tendered payment in the manner set forth in the correspondence offered in evidence by the defendant, of one-half of one per cent. upon said gross receipts for the year ending January 31st, 1896; then the plaintiff, said tender having been refused, as shown in said correspondence, cannot recover in this action any other sum than the amount so tendered, because, even though the court should hold as matter of law that the said act of 1880, chapter 16, was not a contract within the protection of the Constitution of the United States, yet the said act of 1880, chapter 16, was not repealed by the act of 1890, chapter 559.

Thereupon the court refused to grant either of the defendant's prayers.

To which refusal of the court to grant its prayers and to the action of the court in refusing to grant either of said prayers of the defendant, the defendant excepted, and prayed the court to sign and seal this its bill of exceptions; which is accordingly done on this 18th day of June, 1900.

HENRY STOCKBRIDGE. [SEAL.]

Defendant's Order for Appeal.

(Filed July 9th, 1900.)

Mr. Ogle, clerk:

Enter an appeal in this case to the court of appeals of Maryland, on behalf of the defendant, from the judgment entered therein on the 20th day of June, 1900.

BERNARD CARTER,
Att'y for Defendant.

Appellant's costs	$74 70
Appellee's costs	117 45

STATE OF MARYLAND, }
City of Baltimore, } *To wit:*

I, Robert Ogle, clerk of the superior court of Baltimore city, do hereby certify that the aforegoing is truly taken from the record and proceedings of the said court in the therein-entitled cause.

(Seal's place.) In testimony whereof, I hereunto set my hand and affix the seal of the superior court of Baltimore city aforesaid, on the 17th day of September, nineteen hundred.

ROBERT OGLE,
Clerk Superior Court of Baltimore City.

77 Whereupon as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid, by the said The Northern Central Railway Company above for error assigned, being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had, for that it appears to the court of appeals here, that there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid: Therefore it is considered by the court of appeals here, on this 7th day of December, 1900, that the judgment aforesaid, given in form aforesaid, be in all things affirmed with costs, &c., and stand in full force and effect, the said causes for error above assigned and alleged in any wise, notwithstanding.

78 MEMORANDUM.—Judgment was affirmed in this case, on the 7th day of December, 1900, and execution awarded for the sum of $17,124.17 with interest from the 18th day of June, 1900, until paid, $117.45; costs in superior court of Baltimore city, $—, costs in court of appeals of Maryland, & costs & costs.

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

And on the same day and year last aforesaid to wit: December 7th, 1900, the following opinion of the court of appeals was filed, to wit:

79 Court of Appeals of Maryland.

THE NORTHERN CENTRAL RAILWAY COMPANY }
vs.
THE STATE OF MARYLAND. }

Per Curiam:

The questions involved on this appeal are the same that were decided by this court in the case of The State of Maryland *vs.* The Northern Central Railway Company, reported in 90 Md. 497. At that time we were called upon, at the instance of the State, to review the rulings of the court below, which had granted the first prayer offered by the defendant (the railway company) and rejected the second. We reversed the lower court and awarded a new trial. At

the retrial of the case, the first and second prayers offered by
80 the defendant (being the same offered at the first trial) were rejected and judgment was entered for the plaintiff. The defendant excepted to the action of the court in refusing to grant its two prayers and prosecuted this appeal. Without repeating them, for the reasons given in the opinion reported as above stated, we think there was no error in rejecting both prayers offered by the defendant (now appellant) and will affirm the judgment.

Judgment affirmed, the costs to be paid by the appellant.

Filed December 7th, 1900.

81 Know all men by these presents, that the Northern Central Railway Company, a corporation duly incorporated under the laws of the State of Maryland, and Benjamin F. Newcomer of the city of Baltimore, in the State of Maryland, are held and firmly bound unto the State of Maryland, in and for the full and just sum of twenty thousand dollars ($20,000), current money, to be paid to the said State, or its certain attorney; to the payment whereof, well and truly to be made and done, the said The Northern Central Railway Company binds itself, its successors and assigns, and the said Benjamin F. Newcomer binds himself, his executors, administrators and assigns, firmly by these presents.

82 Whereas, the said State of Maryland has recovered in the court of appeals of Maryland at the October term 1900 thereof, a judgment against the said The Northern Central Railway Company, for the sum of seventeen thousand, one hundred and twenty-four dollars and seventeen cents ($17,124.17), upon which judgment the said The Northern Central Railway Company has applied for and obtained a writ of error to the Supreme Court of the United States.

Now the condition of the above obligation is such that if the Northern Central Railway Company aforesaid shall not cause a transcript of the record and proceedings to be transmitted to the next Supreme Court of the United States, within the time
83 required by law, and prosecute said writ of error with effect, and also satisfy and pay to the said State of Maryland, or its certain attorney, in case the said judgment shall be affirmed, as well the damages and costs adjudged by the court of appeals of Maryland aforesaid, as also all damages and costs that may be awarded by the Supreme Court of the United States; then the said bond to be in full force and virtue; otherwise of no effect.

Witness the corporate seal of the said The Northern Central Railway Company, and the signature of —— —— one of its vice-presi-

dents; and the hand and seal of the said Benjamin F. Newcomer, this second day of January, one thousand, nine hundred and one.

THE NORTHERN CENTRAL RAILWAY COMPANY,

84 (Seal's place.) By JNO. P. GREEN, *Vice-President.*

Witness as to the signature of Jno. P. Green, vice-president of the Northern Central Railway Company.
R. S. GREEN.

(Attest:) STEPHEN W. WHITE, *Secretary.*

B. F. NEWCOMER.

Witness as to the signature of B. F. Newcomer.
BERNARD CARTER.

Filed January 7th, 1901.

85 STATE OF MARYLAND, *sct:*

I J. Frank Ford, clerk of the court of appeals of Maryland, do hereby certify that the above and foregoing is a true and correct transcript of the record and proceedings, in the case of The Northern Central Railway Company *vs.* The State of Maryland, as the same remains on file in the clerk's office of the said court of appeals.

And I do further certify that the said court of appeals of Maryland, is the highest court of law or equity in said State in which a decision can be had in said case.

Seal Court of Appeals, Maryland.

In testimony whereof, I have hereunto subscribed my name as clerk of the said court of appeals, and affixed the official seal of the court on this 28th day of January A. D. 1901.

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

Endorsed on cover: File No. 18,037. Maryland court of appeals. Term No. 242. The Northern Central Railway Company, plaintiff in error, *vs.* The State of Maryland. Filed January 29th, 1901.

No. 43.

Brf. of Carter for P. C.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

Filed Oct. 13, 1902.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 43.

THE NORTHERN CENTRAL RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND,

DEFENDANT IN ERROR.

In Error to the Court of Appeals of Maryland.

BRIEF FOR THE PLAINTIFF IN ERROR.

BERNARD CARTER,
For Plaintiff in Error.

5597

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 43.

THE NORTHERN CENTRAL RAILWAY COMPANY

PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND,

DEFENDANT IN ERROR.

In Error to the Court of Appeals of Maryland.

BRIEF FOR THE PLAINTIFF IN ERROR.

The Writ of Error in this case (Record, 1 to 4) is to the Court of Appeals of Maryland, under the 25th Section of Chapter 20 of the Judiciary Act of 1789, Title 13, (See Chapter 11, Section 709, Revised Statute U. S.) to review the final judgment for $17,124.17 in favor of the State of Maryland, the Defendant in Error, rendered in that Court on the 7th day of

October, 1900, (Record, 39), on appeal from the Superior Court of Baltimore City, in the suit of the State of Maryland against the Northern Central Railway Company, the Plaintiff in Error, the Court of Appeals of Maryland being the highest Court of the State of Maryland in which a decision in the suit could be had; and in the suit was drawn in question the validity of the Act of the General Assembly of Maryland of 1890, Chapter 559, being a Statute of that State, upon the ground that it is repugnant to the 14th Section of the First Artitle of the Constitution of the United States, the decision of the Court having been in favor of the validity of the Statute.

HISTORY OF THE LITIGATION IN WHICH THE ABOVE-MENTIONED JUDGMENT WAS RENDERED.

(1) By the Act of Assembly of Maryland of 1890, chapter 559, the State of Maryland imposed a State tax of *one per centum* annually upon the gross receipts of all steam railroad companies incorporated by or under the authority of the State of Maryland or doing business therein, making provision that where any company has part of its railroad in Maryland and part out of it, that company shall pay upon that proportion of its gross receipts which the length of its line in Maryland bears to its whole line.

The suit against the Railroad Company, the Plaintiff in Error, in which the above mentioned judgment of the Court of Appeals of Maryland was rendered, was brought under the provisions of this Act, in the Superior Court of Baltimore City, of the State of Maryland, a Court having original jurisdiction of such suits, in September, 1896, to recover $13,142.35, being *one per centum* upon the gross receipts of the Railway Company within the State of Maryland for the year ending January 31, 1896.

(2) The Railway Company denied the right of the State of Maryland to maintain this suit, claiming, (1) that by virtue of the Act of Assembly of Maryland of 1880, chapter 16, a valid irrepealable contract has been entered into between it and the State, that no greater or other tax should ever be imposed on the franchises, property or gross receipts of the company, than *one-half of one per centum* per annum on the gross receipts of the Company within the State of Maryland, and that, therefore, if the State of Maryland intended the Act of 1890, chapter 559, to be applicable to the said Railway Company and to operate as a repeal of the Act of 1880, chapter 16, said Act of 1890, chapter 59, impaired the above-mentioned contract, and was, therefore, as to the said Railway Company, null and void. And (2) that the State of Maryland did not intend the Act of 1890, Chapter 559, to be applicable to the said Railway Company, and so did not intend it should operate as a repeal of the Act of 1880, Chapter 16.

(3) This suit was tried in November, 1898, in the Superior Court of Baltimore City, before Hon. J. Upshur Dennis, the Judge sitting in that Court, without the aid of a jury. Judge Dennis held (1) that the Legislature *did intend* the Act of 1890, Chapter 559, to be applicable to the Northern Central Railway Company, and did thereby intend to repeal the Act of 1880, Chapter 16, and to impose on said Company a tax of *one per cent.* per annum upon its gross receipts, but (2) that by virtue of the Act of 1880, Chapter 16, a valid irrepealable contract had been entered into between the State and the Company that no other tax should ever be imposed on the franchises, property or gross receipts of the Company, except a tax of *one-half of one per cent.* per annum on its gross receipts within the State of Maryland;

and, therefore, the Legislature could not by the Act of 1890, Chapter 559, impose on the gross receipts of the Company a tax of *one per cent.* per annum. He accordingly gave judgment in favor of the State for only $6,575.17 (Record, 10, 11), the amount admitted to be due by the Railway Company, being *one-half of one per cent.* on the gross receipts of the Company for the year ending January 31, 1896.

He wrote and filed a full, clear, and able opinion in support of his judgment.

Record, 7 to 10.

(4) From this judgment the State of Maryland prosecuted an appeal to the Court of Appeals of Maryland. Upon the hearing of this appeal in January, 1900, the Court of Appeals of Maryland reversed the judgment of the Court below, and remanded the case for a new trial to that Court in order that judgment might be had therein in accordance with the rulings of the Court of Appeals.

The Court in its opinion:

(*a.*) Affirmed the ruling of Judge Dennis that the Legislature *intended* by the Act of 1890, Chapter 559, to repeal, and did thereby repeal the Act of 1880, Chapter 16, and by the former Act imposed on the said Railway Company a tax of *one* per centum per annum on its gross receipts within the State of Maryland. And—

(*b.*) Reversed the other ruling of Judge Dennis, and decided that an irrepealable contract had not been made between the State of Maryland and the Railway Company by the Act of 1880, Chapter 16, that no other tax on its franchises, property or gross receipts should ever be imposed except a tax of one-half of one per cent. on its gross receipts within the State of Maryland; and that, therefore, the Legislature of

Maryland had not, by the Act of 1890, Chapter 559, impaired the obligation of the contract which it had made with the Railway Company.

For the Opinion of the Court see Record 20 to 26.

(5) The new trial thus ordered took place in the Superior Court of Baltimore City on June 18, 1900, on which day a judgment was rendered in favor of the State for the full amount claimed by it, being *one per cent.* on the gross receipts of the Company within the State of Maryland, for the year ending January 31, 1896, interest, etc.

This result necessarily followed under the rulings of the Court of Appeals of Maryland.

But with the view of being able to have the controverted question above mentioned passed on in this Court, (as no final judgment has yet been rendered in the Court of Appeals of Maryland) at the new trial in the Superior Court such facts, documentary and otherwise, as were considered necessary to present the legal questions involved, were again offered in evidence (Record, 27 to 37), and the Railway Company, the Defendant in the case, presented (under the Maryland practice) the same prayers for rulings on the matters in controversy which it had presented at the first trial of the case, the plaintiff offering no prayers. (Record, 37 38.)

The prayers above mentioned are these:

Defendant's Prayer No. 1.

The defendant prays the Court to rule as a matter of law that if the Court, sitting as a jury, shall find from the admission of the parties and the evidence in the case that the Act of Assembly of Maryland of

1880, chapter 16, was duly accepted by the stockholders of the defendant company as required by said Act, and the certificate of acceptance duly filed as therein required; and that the defendant company since the passage of said Act, has done all the things required of it to be done by said Act, including the payment of one-half of one per cent in each year, since the passage of said Act up to the year ending January 31, 1895, inclusive, upon the gross receipts of the defendants mentioned in said Act of 1880, chapter 16, and that it tendered payment in the manner set forth in the correspondence offered in evidence by the defendant, of one-half of one per cent. upon said gross receipts for the year ending January 31, 1896, then the plaintiff, said tender having been refused, as shown in said correspondence, cannot recover in this action any other sum than the amount so tendered, even although the Court determine, as a matter of law, that said Act of 1880, chapter 16, was repealed by the Act of 1890, chapter 559, because the said Act of 1880, chapter 16, *was a valid and binding contract between the* State of Maryland and the Northern Central Railway Company, *and so protected by the Constitution of the United States from impairment by any legislation of the State of Maryland.*

Defendant's Prayer No. 2.

The defendant prays the Court to rule as a matter of law, that if the Court, sitting as a jury, shall find from the admissions of the parties and the evidence in the case, that the Act of Assembly of Maryland of 1880, chapter 16, was duly accepted by the stockholders of the defendant company as required by said Act, and the certificate of acceptance duly filed as therein required, and that the defendant company, since the passage of said Act, has done all the things required of it to be done by said Act, including the payment

of one-half of one per cent. in each year, since the passage of said Act up to the year ending January 31st, 1895, inclusive, upon the gross receipts of the defendant mentioned in said Act of 1880, chapter 16, and that it tendered payment in the manner set forth in the correspondence offered in evidence by the defendant, of one-half of one per cent. upon said gross receipts for the year ending January 31st, 1896; then the plaintiff, said tender having been refused, as shown in said correspondence, cannot recover in this action any other sum than the amount so tendered, because, even though the Court should hold as matter of law that the said Act of 1880, chapter 16, was not a contract within the protection of the Constitution of the United States, yet the said Act of 1880, chapter 16, was not repealed by the Act of 1890, chapter 559.

Both of these prayers were refused by the Judge, to which rulings of the Court the Railway Company took exception in due form, (Record, 38), and a verdict and judgment having been rendered in favor of the plaintiff, the Railway Company took its appeal to the Court of Appeals for a review of these rulings. (Record, 38.)

(6) Upon this Appeal the case was again heard in the Court of Appeals of Maryland in December, 1900, (without any further argument of counsel), and the Court affirmed the rulings of the lower Court, for the reason given in its former opinion (Record, 39-40), and gave the judgment in favor of the State of Maryland for $17,124.17, which is the judgment brought here by the Writ of Error.

Before stating the propositions for which the Plaintiff in Error contends, and in which will be assigned the Errors in the rulings and judgment of the Court of Appeals of Maryland of which the complaint is

made, it is necessary for their intelligent presentation that these should be given to the Court:

A history of the relations between the State of Maryland and the Northern Central Railway Company, and a statement of the legislation of the State out of which the questions to be decided by this Court arise.

1. By the Act of Assembly of Maryland of 1827, chapter 72, the State of Maryland chartered the Baltimore and Susquehanna Railroad Company, with authority to construct a railroad from the city of Baltimore to the Susquehanna River. At the same time other corporations were chartered by the State of Pennsylvania to construct a railroad from a dividing line between Maryland and Pennsylvania, starting in the State of Pennsylvania, and in connection with the Maryland road from Baltimore extending to Sunbury, Pennsylvania, by way of Harrisburg. The line of railroad for the construction of which provision was thus made by Maryland and Pennsylvania was built and operated as practically one railroad, having substantially the same stockholders, and was so being operated as far as Harrisburg at the time of the passage by the State of Maryland of the Act of Assembly of 1854, chapter 250, and the passage in the same year by the State of Pennsylvania of a similar Act.

By these acts of 1854, authority was given by both States to the said several companies to consolidate with each other, so as to form one company or corporation, on *such terms and conditions as the said companies should agree upon*, subject to certain general provisions set forth in the said Acts Among the provisions contained in the Maryland Act was one that all existing laws of the State of Maryland in reference to the said Baltimore and Susquehanna Company should be binding and operative upon the consolidated com-

pany; and that said company should possess all the corporate powers and privileges, and be subject to all the duties and obligations not inconsistent with the Act and its general intent, which were expressed in the charter of the Baltimore and Susquehanna Company.

In the Articles of union which the companies were thus authorized to agree upon, it was declared that all the *property, rights, privileges and immunities* belonging to the several companies *were transferred to the consolidated company.*

2. Among the provisions of the charter of the Baltimore and Susquehanna Company was one exempting forever from taxation all its shares of stock, by means of which provision, *all its property was exempted from taxation*, as had been expressly declared by the Court of Appeals of Maryland long before the year of 1854.

12 Gill & J. 117, Tax Cases.
6 Gill, 288, State vs. B. & O. R. Co.

3. As authorized by the States of Maryland and Pennsylvania, and *by virtue of the articles of union adopted by the companies* the Northern Central Railway Company came into existence, and into the possession of all the *rights, privileges and immunities* of the several companies, by the union of which it was formed.

4. *From 1854 down to the year 1875*, the said company claimed and enjoyed, without question, entire immunity from taxation in reference to all its property within the State of Maryland, under and by virtue of the immunity granted to the Baltimore and Susquehanna Railroad Company by the Act of 1827, chapter 72, and the transfer to it of that immunity.

5. But the State of Maryland having in the year 1872, by chapter 234 of the Acts of 1872 and in the year 1874, by chapter 408 of the Acts of 1874 (the latter

Act superseding the former Act) imposed a tax of one-half of one per cent. upon the gross receipts of all steam railroad companies incorporated by Maryland and doing business therein, suits were brought in the Superior Court of Baltimore City by the State of Maryland against the said company (one in 1873 and the other in 1874) to recover the said tax upon the gross receipts of the company from that part of its railroad lying in the State of Maryland. *These suits were decided, after full argument, by Judge Dobbin sitting in the Superior Court, in an able opinion, in favor of the Company,* and upon appeal, they were heard in the Court of Appeals at the October term, 1875, which Court *reversed* the lower Court (44 Md., 131). The opinion of the majority of the Court was delivered by Judge Robinson.

Judge Alvey, now Chief Justice of the Court of Appeals of the District of Columbia, dissented, and filed an able and elaborate opinion in support of his dissent.

So far as it is necessary to state the grounds upon which the majority of the Court rested its decision, and those on which Judge Alvey rested his dissent, they are as follows:

6. The majority of the Court formed its conclusion upon the following propositions: (*a*) Although the charter granted to the Baltimore and Susquehanna Railroad Company did undoubtedly exempt from taxation all the property of said company, so that if that company had not been consolidated under the Act of 1854 with other companies, and so formed the Northern Central Railway Company, its gross receipts from the road could not be taxed, yet the effect of the consolidation was to form a new company, and merge the Baltimore and Susquehanna Railroad Company and all its rights, privileges and

immunities into the new company; and that, therefore, it followed that although the immunity from taxation which the Baltimore and Susquehanna Company enjoyed was to be enjoyed by the new company, it was enjoyed by a new and special grant from the Legislature, which grant was made by the Act of 1854 which created the new corporation.

(*b*) This being so, then as this Act was passed during the existence of the Constitution of 1851, which provides that all general laws or special Acts creating corporations, may be altered from time to time or repealed, the Act of 1854, chapter 280, was alterable or repealable.

(*c*) That the Acts of Assembly of Maryland, of 1866, chapter 157, and 1870, chapter 362, had repealed the exemption granted by the Act of 1854, chapter 250.

44 Md. 163.

7. To the contrary, Judge Alvey held that the immunity from taxation which had belonged to the Baltimore and Susquehanna Company, was *never surrendered or extinguished*, but was kept alive and vested in the new company, to be by it enjoyed just as it had been by the Baltimore and Susquehanna Company, passing to the new company as an incident to its stock or property, and became vested in the new company, *not at all by grant from the State, but under the articles of union which the companies entered into; and consequently was not brought within the* provision of the constitution, and that therefore the Legislature could not, by a repeal or modification of the Act of 1854, chapter 250, destroy or impair the original franchises, privileges, or immunities granted to the Baltimore and Susquehanna Railroad Company, which were *transferred* to the Northern Central Railway Company, and were secure under the Constitution of the United States. (44 Md. 174 to 177.)

Referring to the positions taken by the State, he said:

"As to the first, that the defendant was, to all intents and purposes, created a new corporation by, and derived all its powers, rights, privileges and immunities from, the Act of 1854, and is therefore subject to any tax that the Legislature may think proper to impose, I think is not sustainable either upon reason or authority.

"It must be observed, that the corporations consolidating did not propose to the Legislature to surrender all their franchises, powers, rights, privileges and immunities to the State, to be disposed of as it might think proper; nor did the Legislature propose to release and discharge them from their duties and obligations. It was simply proposed by the companies, with the sanction and authority of the State, to unite and consolidate themselves, with all their property, franchises, rights, powers, privileges and immunities, under a new organization, and the Legislature was appealed to for authority thus to unite and combine, to accomplish the objects of their original charter. This consolidation when formed resulted in a new corporate body, as matter of convenience as well as of necessity. But it did not follow that the original corporations were all dissolved, and that their franchises, powers and privileges reverted to the State granting their charters. It is manifest, both from the Act of 1854, and the articles of union and consolidation, that such was not the intention, and neither the State nor the companies ever supposed for a moment, that there was anything more in the Act of 1854, than an authority to unite and consolidate existing corporations on certain conditions; the corporations in no manner being required to abandon or surrender their existing franchises, privileges and immunities. The inducement to the consolidation was the existing rights, privileges and immunities, held by the several corporations consolidating, and with these it was neither within the power, nor was it the purpose, of the Legislature to interfere. It was not the Act of 1854, that produced the consolidation, but it was the articles of union agreed on by the corporations themselves, under the authority of the Act, as the means the better to accomplish the objects for which their several charters were granted. The separate organizations and control were surrendered to the new organization, and became merged therein; but in doing that, it was required that the consolidated company should 'bring its organization into agreement and consistency with the terms and conditions of the charters of the several companies, *of which the said consolidated company shall be composed.*' The charters were not

only subsisting, but by the express terms of the Act of 1854, all the laws in reference to the Baltimore and Susquehanna R. Company, were made binding and operative upon the consolidated company, so far as its property or its operations might be within the jurisdiction of the State.

"In this view of the subject, I cannot resist the conviction, that the case falls exactly within the reason and principle of the case of the *Philadelphia, Wilmington and Baltimore Railroad Company vs. Maryland*, 10 *How.*, 376. In that case, the railroad company mentioned was a corporation composed of several railroad companies which had been previously chartered by the States of Maryland, Delaware and Pennsylvania; and which, by corresponding laws of the respective States, were united together, and formed one corporation under the name and style just mentioned. And in determining upon the rights that this consolidated company acquired under the Act authorizing the consolidation, Chief Justice TANEY, speaking for the Court, said: 'Now, as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed, should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. And this intention is made still more evident by the fourth section of the law, which makes the new corporation responsible for the contracts, debts, obligations, engagements and liabilities at law or in equity of the several companies, and declares that it shall hold and be entitled to all the estate, real, personal and mixed, &c., belonging to or due to the several companies.' The Act authorizing the consolidation in that case, was very similar in substance to the one under which the consolidation of the companies in this case took place. And in the more more recent case, involving a similar question, the same learned tribunal has declared, that 'The keeping alive of the rights and privileges of the old company, and transferring them to the new company in connection with the property, indicates the legislative intent, that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby.' *Tomlinson vs. Branch*, 15 *Wall.*, 460, 465. The same principle is fully stated and applied in the *Delaware Railroad Tax Case*, 18 *Wall.*, 206.

"If, then, the rights, privileges and immunities of the Baltimore and Susquehanna Railroad Company were not surrendered or extinguished, but were kept alive, and transferred to and vested in the consolidated company, as they were originally granted, to be exercised and enjoyed as before the consolidation, it follows that the exemption from taxation, being one of the privileges or immunities to which the original company was entitled under its charter, adhered and passed as incident to its stock or property, and that such exemption was in no manner rendered subject to legislative control by the Act of 1854. By the transfer authorized by the Act and made by the articles of union and consolidation, the franchises, rights, privileges and immunities previously granted, and which were, by the well-established law at the time, beyond legislative control, became vested in the consolidated company, not by grant of the State, but under the articles of union, and consequently were not brought within the provision of the Constitution of 1850. The most that the State could claim to do under the constitutional provision, would be either to repeal or modify the Act of 1854; but by neither a repeal of nor alteration in that Act could the Legislature destroy or impair the original franchises, rights, privileges or immunities granted to the Baltimore and Susquehanna Railroad Company, and which are secured under the Constitution of the United States."

8. These two opinions having been delivered and filed, the judgment of the Superior Court in favor of the company was reversed and the cases were sent back, to be *re-tried* in the Superior Court of Baltimore City, in March, 1876.

In these cases, which had been thus remanded to the Superior Court of Baltimore City in March, 1876, for a new trial, no movement had been made by the State, the plaintiff in the cases, to bring them to a trial, up to the time the above mentioned Act of the General Assembly of Maryland of 1880, chapter 16, was passed, under which Act the Plaintiff in Error claims the rights, for the maintenance of which, the present Writ of Error is brought.

This Act is printed in full in the Record, pages 32 to 34; also on pages 12 to 14.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns the following as the errors committed by the Court of Appeals of Maryland in its rulings and judgment; that is to say—By its rulings and judgment, appearing in the Record in this case, the said Court adjudged and determined that the Act of Assembly of Maryland of 1880, chapter 16, its acceptance and the performance of its conditions by the Northern Central Railway Company, did not constitute, between the State and the company, a valid irrepealable contract, that no tax should be imposed by the State of Maryland, upon the property, franchises and gross receipts of said company, except an annual tax of one-half of one per cent. per annum on its gross receipts within the State of Maryland, and that as the said Act of 1880, chapter 16, was repealed by the Act of Assembly of Maryland of 1890, chapter 559, and thereby there was imposed an annual tax of one per cent. on the gross receipts of said company within the State of Maryland, said repeal and imposition of said tax was an exercise of lawful legislative authority by said State, and did not impair the obligation of the compact made by the State with said company; and said Court did therefore render judgment on December 17, 1900, against said company in favor of the State of Maryland for $17,124.17, being one per cent. on the gross receipts of said company for the year ending January 31, 1896, with interest for each and costs.

There having been thus drawn in question in the Court of Appeals of Maryland, the validity of the said Act of Assembly of Maryland of 1890, chapter 559, upon the ground that it is repugnant to the tenth section of Article 1 of the Constitution of the United States, and the decision of said Court having been in favor of the validity of the said statute, this Court has jurisdiction to review the said judgment; and there being for the reasons above stated, error in said judgment of the Court of Appeals of Maryland, it must be reversed by this Court.

The Record (as required by the rule in such cases, 114 U. S. 135, Detroit R. R. vs. Guthard), shows that the Federal question above stated was raised, and

decided as set forth in the Assignment of Errors. See Prayers offered by Railway Company, (Brief, pages 5-7); opinion of Court on First Appeal (Record, 23 to 26), and on Second Appeal (Record, 39).

PROPOSITIONS UPON BEHALF OF THE PLAINTIFF IN ERROR.

FIRST PROPOSITION.

The State of Maryland by the Act of 1880, chapter 16, and by its acceptance by the Northern Central Railway Company, entered into a contract, upon the terms and conditions therein set forth, with the company, upon valuable considerations moving to the State from the company, whereby the State agreed that no tax should ever thereafter be imposed under the laws of the State, upon the franchises, property or gross receipts of the company, except an annual tax of one-half of one per cent. on the gross receipts of the company within the State of Maryland.

SECOND PROPOSITION.

The contract thus made was a valid contract establishing the extent to which the property, franchises and gross receipts of the railway company could be taxed by the State of Maryland, not only so long as the contract existed, but it was not subject to alteration or abrogation by the State of Maryland by a repeal of the Act of 1880, chapter 16, or otherwise; and the contract remained forever binding upon both of the parties to it until put an end to by the consent of both parties.

THIRD PROPOSITION.

The railway company having fully complied with the terms and conditions of the contract, and its consent to the abrogation of the contract never having

been obtained, it has not been, and is not now, within the power of the State of Maryland to impose any tax upon the franchises, property or gross receipts of the company, except a tax of one-half of one per cent. per annum on the gross receipts of the company within the State of Maryland.

FOURTH PROPOSITION.

The State of Maryland having by the Act of Assembly of 1890, chapter 559, repealed the Act of 1880, chapter 16, and imposed a tax of one per cent. annually thereafter upon the gross receipts of the company within the State of Maryland, thereby impaired the obligation of the contract, contrary to the inhibition contained in the tenth section of the first Article of the Constitution of the United States.

FIRST PROPOSITION.

The State of Maryland by the Act of 1880, chapter 16, and by its acceptance by the Northern Central Railway Company, entered into a contract, upon the terms and conditions therein set forth, with the company, upon valuable considerations moving to the State from the company, whereby the State agreed that no tax should ever thereafter be imposed under the laws of the State, upon the franchises, property or gross receipts of the company, except an annual tax of one-half of one per cent. on the gross receipts of the company within the State of Maryland.

This proposition does not involve the question whether the contract therein mentioned was a contract which the State had a right to make, subject to abrogation by a repeal of the Act of 1880, Chapter 16, nor whether it was an irrepealable contract. These are questions involved in the *Second Proposition* above stated.

In support of this first proposition it is respectfully submitted.

I.

It is the established law of this Court that a legislative enactment, in the ordinary form of a Statute, may contain provisions, which when accepted as a basis of action by individuals or corporations, become contracts between them and the State.

6 Cranch, 135, Fletcher vs. Peck.
16 Howard, 428, Ohio Life Ins. etc. Co. vs. Debolt.
16 Howard, 389, State Bank, etc. vs. Knoop.
101 U. S. 114, New Jersey vs. Yard.
114 U. S. 292, Virginia Coupon Cases.

CONSTRUCTION OF THE ACT OF 1880, CHAPTER 16.

I.

It was the intention of the State and the Railway Company to enter into a binding contract.

It is clear from the Act of 1880, Chapter 16, that the intention and understanding of the State and of the Railway Company was that by the passage of this Act, its acceptance by the Railway Company, and compliance by it with the conditions upon which the Act was to take effect, a *contract would be made between the parties*, the provisions of which were embodied in the Act.

This is made manifest by the title of the Act, its preamble and the body of the Act.

(*a.*) In its title the Act declares that it is an Act to adjust and settle *finally* by AGREEMENT *all pending con-*

troversies between the State of Maryland and the Northern Central Railway Company *by subjecting the franchises and property of said Company within the State to taxation for State purposes to* A CERTAIN EXTENT, and providing for the payment of a certain indebtedness claimed by the State of Maryland to exist on the part of the Railway Company to the State.

The recitals of the preamble are in keeping with the title, and set forth the *nature* of the controversy then existing between the State and the Railway Company. It says that a controversy had arisen and then exists between the parties in reference to the *right* of the State of Maryland to subject to taxation the franchises and property of the Railway Company; that this controversy was this: (1) a claim by the Company that all of its franchises and property were forever exempt from taxation, the ground of the claimed exemption being that among the terms and conditions of the union and consolidation of the Baltimore & Susquehanna Railroad Company with the other Companies forming the Northern Central Railway Company, and which union and terms and conditions were authorized by the Act of Assembly of Maryland of 1854, Chapter 250, was the condition that the latter Company should have all the rights and privileges, and immunities of each of said Companies, and that among the immunities of the Baltimore & Susquehanna Railroad Company was the immunity from taxation: (2) the denial of this claim by the State of Maryland; the State claiming that *notwithstanding* the provisions of the Act of 1854, Chapter 250, and all the terms and conditions thereby authorized for the union and consolidation of the several companies therein mentioned, all the property of the Company, including its gross receipts, was liable to taxation by the State of Maryland. The preamble further recites the claims of the State, and

the Railway Company, being as above stated, that an annual tax of one half of one per cent. upon the gross receipts of all Railroad Companies worked by steam incorporated by the State of Maryland having been imposed by the Acts of Assembly of Maryland of 1872 and 1874, suits had been instituted to recover of the Northern Central Railway Company this tax, and the State had caused the property of the Company to be assessed as liable to taxation for county and municipal purposes.

The preamble then recites that the Railway Company has the right to have this question thus at issue between the State of Maryland and the Railway Company carried to the Supreme Court of the United States to be there decided, and that it had been represented to the General Assembly that what would be the ultimate decision of this question is a matter of great doubt, and that it is deemed to be moreover just and proper that an equitable *settlement* should *be made of the matters so in controversy*, and that it had been represented to the General Assembly that the Railway Company, *for the purpose of making such settlement*, is willing to pay a tax of one half of one per centum on its gross receipts within the State, upon the terms and conditions thereinafter, that is, in the body of the Act, set forth.

The title declared that the object of the Act was to adjust and settle *finally by agreement* all pending controversies between the State and the Railway Company, by subjecting the franchises and property of the company within the State, to *taxation* for State purposes, *to a certain extent;* but did not set forth the nature of the controversy, or the details of the agreement so to be made.

The preamble then proceeds to state the question which forms the subject of controversy, and that if no *agreement* could be entered into for its settlement, it

must be decided by the Supreme Court of the United States, and that instead of its being left for such decision it was deemed just and proper that an equitable settlement should be made of the matter in controversy, and that for the purpose of making such settlement the Railway Company is willing to pay the tax therein mentioned, upon the terms and conditions set forth in the body of the Act.

Considering, therefore, the title and preamble together, it is respectfully submitted that, there can be no room for fair controversy, that the State and the Railway Company understood that what was taking place was *the making of a contract between them* upon the terms set forth in the body of the Act, of the controversy then existing as to the right of taxation by the State of the property and franchises of the Railway Company.

The body of the Act still further manifests the same understanding of the parties. For, after setting forth the terms and conditions of the contract, (which the concluding clause of the preamble said would be therein set forth,) that is to say, that the franchises and property and gross receipts of the Company within the State of Maryland shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon its gross receipts within the State of Maryland, and that said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland, (*excepting certain classes of property mentioned in the proviso, which proviso will be hereafter explained, but is in no way material to the questions now before the Court*). The body of the Act then declares that it shall not take effect until the sum of money mentioned in the Act shall have been paid as therein set forth, nor until the Act and all of its provisions *shall have been accepted*

in the method set forth in the Act, that is to say, by the stockholders of the Company at a general meeting of the same, the acceptance to be evidenced by an instrument of writing under the corporate seal of the Company, to be filed in the office of the Secretary of State of Maryland.

It is thus apparent that the State, one party to the intended contract, declares its assent to its terms in the way in which alone the State could manifest its assent and be bound by the contract, that is to say, by an Act of Assembly of Maryland approved by its Governor; but as both parties realized that the proposed contract could not be made unless the assent of both parties to it was given, therefore the Act requires that the assent of the Railway Company shall be given, and *recognizing the importance and solemnity of the proposed contract*, requires that it should be assented to, not by the Directors of the Company, but by its Stockholders.

It is impossible to conceive that the Act of Assembly of 1880, chapter 16, would have been required to be assented to by the Company if the parties did not understand that the controversies between them were to be settled by virtue of a solemn contract entered into for the purpose; but, understood that instead thereof, the State of Maryland was, of its own volition, granting to the Company the right to pay the limited amounts of taxation in the Act stipulated for in lieu of the obligation to pay the same taxes which other similar companies would, from time to time, be obligated to pay under the laws of the State of Maryland.

It is respectfully submitted, therefore, that the Act of 1880 was by both the State of Maryland and the Railway Company understood and intended to be a contract made between them whereby the controversy then existing between them should be finally terminated upon the terms set forth in the Act of Assembly.

It was the intention of the parties to the contract, that a contract was entered into between them that no tax should ever thereafter be imposed under the laws of the State, upon the franchise property or gross receipts of the Railway Company, except an annual tax of one per cent. on the gross receipts of the Company within the State of Maryland.

The very nature of the respective claims of the parties to the contract, which the Act was intended to settle finally by agreement, shows that the stipulation of the contract that the franchises, property and gross receipts of the Company shall be subjected to an annual tax of one half of one per cent. on the gross receipts within the State of Maryland, but shall not be subject to any other tax under the laws of Maryland, can only be interpeted to mean, that this was to be of perpetual duration.

For the claim of the Company was that all its franchises and property of every kind and description was *forever* exempt from taxation, and the claim of the State was that all its franchises and property was forever subject to taxation, according to the system, and at the rates of taxation current from time to time under Maryland Statutes; which respective claims the *title* of the Act declared were to be *finally settled* by agreement by subjecting the property and franchises of the Company within the State to taxation to a "certain extent," which "certain extent" was subsequently defined in the preamble and body of the Act to be an annual tax of one half of one per cent. of the gross receipts of the Company within the State of Maryland.

That which was to be settled *finally by agreement* was not the extent of taxation for the time being, nor during the pleasure of one or both the parties, but was to be co-extensive as to duration of time with the

extent of the respective claims so settled, *and in substitution for each of which* the limited taxation mentioned in the contract was made.

The payment of the annual tax of one-half of one per cent. on the gross receipts was a substitution for the annual tax as the State claimed the right to impose, which claim was to tax in *each and every year forever, all the property and franchises* of the Company; and it was in substitution for the claim of the Company that never in any year could any tax be imposed on any of its property. Certainly no settlement of the respective claims of the State and the Company could be called a *final* settlement, which was not one to cover all *future taxation*.

In explanation of the meaning, in the first section of the Act of 1880, chapter 16 of the *proviso* following the provision that the franchises, property and gross receipts of the company shall not be subject to any other tax under the laws of the State of Maryland, except the tax of one-half of one per cent. on its gross receipts.

This proviso is that all such property, works and structures of the company which are, or may be, taxable within the meaning of the Court of Appeals of Maryland rendered in the year 1878, in the case of the State of Maryland vs. Baltimore & Ohio Railroad Company, shall be still subject to taxation for county and municipal purposes in the same way and to the same extent as the property of individuals. The decision of the Court of Appeals of Maryland referred to in this proviso is that to be found in 48 Md., page 49, in which case the Court of Appeals had under consideration the charter of the Baltimore & Ohio Railroad Company, passed in the year 1826, which contained a similar provision for the exemption of its property from taxation as that contained in the Act of 1827, chartering the Baltimore & Susquehanna Railroad Company. In this case, the Court of Appeals held that the tax exemption included all franchises of the company, and all the property, works and structures of the company, which were reasonably convenient and appropriate to the maintenance and operation of the railroad authorized to be constructed by the charter of the company granted in 1826, chapter 123; but did not include property or works not coming within this classification; and, therefore did not include elevators except so far as they

were necessary in connection with the receipt and delivery of grain and freight to consignees, and that they were taxable so far as they were used for other purposes, and the exemption did not include hotels, except in so far as they were used in connection with travel over the railroad; nor did it include properties, or the gross receipts from the properties, constructed under charters granted subsequently to the original charter, and which subsequent charters contained no exemption from taxation.

The Contract Was Made Upon Valuable Consideration.

In support of this proposition, it is respectfully submitted—

I.

The consideration for the contract thus entered into was the compromise and settlement of the pending litigation between the State and the company mentioned in the Act, in which litigation was involved the question of the right of the State to levy *any* tax upon any of the property, franchises, or gross receipts of the company; and the consideration received by the State was the agreement thereby made upon the part of the company to pay forever to the State, taxes on its gross receipts to the extent mentioned in the Act, and the payment of the certain sum of money in the Act mentioned.

That the contract was supported by a sufficient consideration, moving from the company, appears, therefore, on the face of the Act, of which Act the preamble is an important part, and furnishes the key-note to its construction. The contract thereby made between the State and the company was a settlement of all *disputed questions* upon the subject of taxation

then existing between the State and the company, under which the company paid a large sum of money to the State, none of which it owed according to its contention, and agreed to pay forever an annual tax of one-half of one per cent. on all its gross receipts in Maryland, whereby abandoning to this extent, its claim to exemption from taxation, and its right to have decided by the Supreme Court of the United States the question whether it was liable to pay anything at all.

(*a*) Either the compromise of a doubtful claim or the relinquishment of a pending suit is a good consideration for a promise; and to support a compromise it is sufficient that the parties entering into it, thought at the time that there was a *bona fide* question between them, although it may eventually turn out there was in fact no such question.

Law Rep., 5 Queen's Bench, 451, Callister vs. Bischofheim.

27 Md. 172, Harte vs. Stahl, and cases cited.

5 Peters, 114, Union Bank vs. Geary.

(*b*) Inasmuch as in the cases of the State of Maryland vs. N. C. Ry. Co., 44 Md. page 131, there was drawn in question the validity of the Statutes of Maryland repealing the exemption claimed by the said company by virtue of the Act of 1827, chapter 72, section 20, on the ground of their being repugnant to the Constitution of the United States, which prohibits a State from making any law impairing the obligation of a contract, and the decision of said Court was in favor of their validity, there could be no doubt that a writ of error would have laid to the Supreme Court of the United States, on behalf of the company, from the final judgment when it should

have been rendered by the Court of Appeals after a re-trial in the Superior Court.

153 U. S. 492 to 495, Mobile &c., R. R. Co. vs. Tennessee.

168 U. S. 501, Douglass vs. Kentucky.

And as at the time of the passage of the Act of 1880, chapter 16, no re trial of the cases had yet taken place in the Superior Court of Baltimore City, *the State of Maryland, the plaintiff in the cases, having allowed the cases to lie dormant*, and until that trial and a judgment rendered thereia against the company, and an affirmance of that judgment by the Court of Appeals of Maryland, no writ of error would lie to the Supreme Court of the United States, the company, at the time of the passage of the Act of 1880, chapter 16, still had the right to take the cases to the Supreme Court of the United States.

(*c*) As the powers of the General Assembly of Maryland are limited only by the provisions of the Constitution of the State and of the United States, the Legislature of 1880 had the undoubted and unlimited power to determine whether the decision of the Supreme Court of the United States, in case a writ of error had been sued out by the Company, was sufficiently a matter of doubt as to make it wise for the best interests of the people of the State, to make the compromise and settlement of the then pending litigation.

15 Md., 387, 388, 472, 473, M. & C. C. of B. vs. State.

75 Md. 313, Jackson vs. Walsh.

The General Assembly being therefore clothed with full power to deal with the subject by an Act of Assembly passed by it, and approved by the Governor, as

required by the Constitution of Maryland, and having in the exercise of this power determined, and evidenced its determination in the Act of 1880, Chapter 16, that the result of the litigation which the company had the indisputable right to carry to the Supreme Court, was of a sufficiently doubtful character to make it for the best interest of the State to make the compromise which is made by the said Act, this action of the State in 1880 is forever conclusive upon it, and it is not within the judicial power of the State to enquire as to the question whether the legislature was mistaken in the opinion that the result of the litigation was a matter of doubt.

II.

But even if this Court could inquire into and decide the question whether the result of the litigation when carried to the Supreme Court was a matter upon which there could be at the time of the passage of the Act of 1880, a *bona fide* difference of opinion, the Court could not reach the conclusion that such was not the case.

For although the majority of the Court, in the cases of the State of Maryland against the Northern Central Railway Company, 44 Md. 131, held (1) that a new corporation, the Northern Central Railway Company, was created by the Act of 1854, Chapter 250, which was, therefore, a new charter of a corporation in the year 1854, and that the immunity from taxation which had been held by the Baltimore and Susquehanna Company, was vested in the said Northern Central Railway Company, but was so vested by virtue of a new and special grant made to said Company by the State of Maryland as a part of the said Act by which the new corporation was created, and that as said Act and all its parts was subject to

repeal or alteration by virtue of the provisions of the Constitution of 1850, said immunity was subject to repeal—(44 Md. 163 to 165)—yet Judge Alvey, in his vigorous and able opinion, (from which I have quoted in a previous part of this Brief, pp. 12-14), denied the correctness of one of the premises upon the correctness of which the conclusion reached by the Court depended, that is to say, *denied* that the Northern Central Railway Company derived all its powers, rights, privileges and immunities by a new grant from the State of Maryland made by the Act of 1854, and that the enjoyment by the Northern Central Company of the immunity from taxation which had belonged to the Baltimore and Susquehanna Company, was *derived by a new* grant made to said Northern Central Railway Company by said Act of 1854, chapter 250; but on the contrary, he claimed that the said immunity had never been surrendered by the Baltimore and Susquehanna Company, and was with the assent of the Legislature of Maryland transferred, in all its fullness and life, to the Northern Central Railway Company, *by virtue of the articles of union* entered into between the consolidated companies, and by virtue of the said Baltimore and Susquehanna Company being a party thereto; and that, therefore, said immunity was as much beyond the power of the Legislature of Maryland to interfere with as it had been while possessed by the Baltimore and Susquehanna Company, it being admitted by the majority of the Court (44 Md. 163), that while said immunity was held by the Baltimore and Susquehanna Company, it could not be in any way impaired by any action of the Court. (44 Md. 174 to 177, Alvey, J.)

2. Therefore, inasmuch as the difference in the result reached by the majority of the Court in the said case in 44 Md. 131, and in the result reached by the minority, depended altogether upon the different

construction placed by each upon the instrument relating to the said rights and immunities, and from which they emanated, it is impossible to affirm that the parties to said instrument could not *bona fide* believe that the decision of the Supreme Court of the United States, when it came to construe said instrument, might not agree with the minority.

3. For, while the Supreme Court of the United States has in several cases held that a consolidation of railroad companies by an Act of the Legislature may so operate as to make the charter of the consolidated company thenceforth amendable or repealable at the will of the Legislature, where there is a general statute or constitutional provision declaring that all charters passed subsequently to the adoption of the constitution or the general Act, should be amendable and repealable, and that under this power the State may take away immunities from taxation which, prior to the consolidation, had belonged to one of the companies, and in the consolidating act had been transferred to the consolidated company, yet the Court has *uniformly* held that whether such a construction is to be put upon any particular Act authorizing the consolidation of companies, must depend *upon the particular terms of the Act and the intention of the parties.*

92 U. S. 670, Central R. R. vs. Georgia.
92 U. S. 677, Branch vs. Charleston.
94 U. S. 718, C. & O. R. Co., vs Virginia.
117 U. S. 139, 149, Tennessee vs. Missouri.
152 U. S. 305, Keokuk & W. R. Co. vs. Whitlock.

4. Therefore, as the true meaning and effect of the Maryland Act of 1854, chapter 250, and of the consolidation effected thereunder was the subject of directly diverse views by the majority and minority

of the Court, there was the amplest ground for the Legislature *bona fide* to believe that the conclusion of the Supreme Court of the United States was a matter of sufficient uncertainty as to warrant the Legislature in determining to deal with the matters in controversy between the State and the company just in the way the Act of 1880 dealt *with them*.

It is, therefore, respectfully submitted that the FIRST Proposition (Brief page 16) of the plaintiff in error has been sustained.

SECOND PROPOSITION.

The contract thus made was a valid contract establishing the extent to which the property, franchises and gross receipts of the railway company could be taxed by the State of Maryland, not only so long as the contract existed, but it was not subject to alteration or abrogation by the State of Maryland by a repeal of the Act of 1880, chapter 16, or otherwise; and the contract remained forever binding upon both of the parties to it until put an end to by the consent of both parties.

In support of this proposition we respectfully submit:

I.

(1) It is settled by the decisions of this Court, as well as by the decisions of the State of Maryland, that a State, unless prohibited by its Constitution, may make a contract with a corporation chartered by it, to exempt all of its property from taxation, or agree to accept from it a less rate of taxation than that to be imposed on others, either for a specified

time or permanently if such contract has a sufficient consideration to support it.

18 Wallace, 225, The Delaware Railroad Tax.

16 Howard, 428, Ohio Life I. Co. vs. Debolt.

16 Howard, 389, State Bank of Ohio vs. Knoop.

8 Wallace, 427 and 438, Home of Friendless vs. Rouse.

50 Md., 428 and 429, Appeal Tax Court of Baltimore City vs. Grand Lodge, etc.

(2) It is also settled by the decisions of this Court, and also by those of Maryland, that where a State grants a charter to a corporation, which is accepted, and therein stipulates for an exemption of its property from taxation, partial or total, and the Constitution of the State does not prohibit such exemption, a valid contract for such exemption is made: the objects for which the corporation is created and the performance of its duties constitute a sufficient consideration.

8 Wallace, 437 and 438, Home of Friendless vs. Rouse.

(3) And it is entirely competent for a State, unless prohibited by its constitution, to make an agreement with a corporation, subsequent to its charter, for an exemption of its property from taxation, partial or total, and such an agreement constitutes a valid contract if supported by a consideration of some kind.

50 Md. 428 and 429, Appeal Tax Court of Baltimore City vs. Grand Lodge, etc.

24 Howard, 300, Directors of Christ Church vs. County of Philadelphia.

22 Wallace, 528, Tucker vs. Ferguson.

(4) At the time of the passage of the Act of 1880, chapter 16, there was nothing in the Constitution of Maryland, nor has there ever been anything in any of the Constitutions of Maryland, which prohibits the State from exempting the property of a particular corporation from taxation, either total or partial. In this respect the present Constitution, that of 1867, is the same as all preceding constitutions. Among the many cases in Maryland which have recognized the validity of such exemptions are

12 Gill & Johnson, 117, (relating to the Charter of the Balto. & Susquehanna R. R. of 1827, chapter 22.)

6 Gill. 288, Mayor and City Council of Balto. City vs. B & O. R. R. Co., and 48 Md. 749, State of Md. vs. B. & O. R. R. Co., (in reference to the charter of the Balto. & Ohio R. R. Co.)

2 Gill. 355, P. W. & B. R. R. Co. vs. Bayless, and 45 Md., page 361, State of Md. vs. P. W. & B. R. R. Co., (in reference to the charter of the P. W. & B. R. R. Co.)

50 Md. 428 and 429, Appeal Tax Court vs. Grand Lodge, etc.

The practice of making such exemptions thus commenced may years ago, still, from time to time, continues in the legislation of the State.

II.

It follows from the foregoing that the contract entered into between the State of Maryland and the Northern Central Railway Company by the making and acceptance of the Act of 1880, chapter 16, having been made for valuable consideration was a valid and effective contract, according to its terms at least

AS LONG AS THE CONTRACT EXISTED, and that until the contract was terminated, the only tax which could be imposed by the State of Maryland upon any of the franchises, property or gross receipts of the Company, is an annual tax of one-half of one per cent. upon the gross receipts of the Company within the State of Maryland.

III.

The contract thus made was not subject to alteration or abrogation by the State of Maryland by a repeal of the Act of 1880, Chapter 16, or otherwise, but remained binding upon both parties to it until modified or put an end to by the consent of both of them.

The correctness of this proposition follows necessarily from the foregoing argument, unless the Constitution of Maryland in existence at the time the contract was made prohibited the Legislature of the State *from making the contract irrepealable.*

It is respectfully submitted that the Constitution did not prohibit the Legislature from making this contract irrepealable, as I will indeavor to show in connection with an examination of the opinion of the Court of Appeals of Maryland on which its judgment in the case is founded.

IV.

The first ground taken by the Court of Appeals of Maryland in support of its decision that the Legislature of Maryland had no power, by the Act of 1880, Chapter 16, to make with the Railway Company the irrepealable contract which it attempted to make, and supposed it was making, by the passage of that Act, is this, that prior to the passage of the Act of 1880, it had been determined by the Court of Appeals of

Maryland in the case of the State vs. the Northern Central Railway Company, 48 Md. page 131, that all the rights and privileges, including the exemptions from taxation, which had been granted to the Baltimore & Susquehanna Railroad Company by the Act of 1827, were vested in the Northern Central Railway Company, *not by transfer from the Baltimore and Susquehanna Railroad Company, but as a new and special grant by the State*, under the Act of 1854, Chapter 250; and that by *that Act* the Northern Central Railway Company had been created a corporation, and that it *was not created by the articles of union executed by the several companies out of which it was formed;* that as the Act was passed while the Constitution of 1850 was in operation, all the rights, privileges and immunities, it had under its charter, were subject to repeal by the Legislature, whenever in its judgment the public interest required such repeal; and that by legislation subsequent to the Act of 1854 its exemptions from taxation had been repealed.

From this premise the Court, in the present case drew its conclusion, that as the Act of 1880, Chapter 16, which was declared to be supplemental to the Act of 1854, Chapter 250, granted a *partial exemption* to the Company, this exemption was subject to repeal under the provisions of Section 48 of Article 3 of the Constitution of 1867, as *the total exemption* had been subject to repeal under said Constitution and its predecessors.

V.

In reply to this position of the Court of Appeals of Maryland, it is respectfully submitted:

(1) That although the decision of the Court of Appeals of Maryland in the case of the State of Maryland vs. The Railway Company, 48 Md., page 131, was as above stated, and had been made at the

time the Act of 1880, chapter 16, was passed, *yet the fact that this decision had been thus made did not in any way prevent the Legislature of Maryland from making an irrepealable contract with the railway company upon the consideration and terms set forth in the Act of 1880.*

If, at the time of the passage of the Act of 1880, it had been *finally adjudicated* that all the rights, privileges and immunities of the Northern Central Railway Company under its charter were subject to repeal or alteration by the State of Maryland at its pleasure, then it would, of course, necessarily follow, as was decided by the Court of Appeals of Maryland in the case now before the Court, that neither the Legislature of 1880 nor any other Legislature of the State, could make an irrepealable contract with the company to limit the right of taxation of the property of the company by the State of Maryland.

Now if the conclusion of the Court of Appeals, as above stated, that because the Court of Appeals in in the case referred to had determined that the rights, privileges and immunities of the company had been declared by that decision subject to alteration or repeal, therefore the Legislature of 1880 could not make a contract fixing the extent of the taxation of the property permanently, is a sound one, the *sole basis* upon which it can rest must be that that decision of the Court, as made in the case above stated, was *a final adjudication of the matters so decided by it.*

But it has been shown in the previous part of this brief that so far from that adjudication having ascertained finally, at the time of the passage of the Act of 1880, the respective rights of the State and the company in reference to the enjoyment by the company of the rights and immunities which had been those of the Baltimore and Susquehanna Railroad Company, the company had the undoubted right to have that question determined by this Court; and

that if its contentions (supported as they were by the opinion of Mr. Justice Alvey, who dissented from the opinion of his brethren in the case above mentioned) had met with the sanction of this Court the result would have been that the State of Maryland *never at any time could have subjected any of the property or franchises of the company to taxation.*

It has been further shown that the State of Maryland, speaking in the Act of 1880, chapter 16, through that branch of its government which had the indisputable right to speak upon the subject, had determined that what would have been the result, if the case had been brought to this Court, was sufficiently a matter of doubt to make it the part of wisdom upon the part of the State to make the contract it did make by the Act of 1880, and thereby secured in perpetuity the obligation of the Company to pay the amount of taxes therein stipulated to be paid, in addition to securing the money payment mentioned in the Act. I respectfully refer to that portion of the brief in which this subject has been discussed to show that the contract made between the State and the Company, the terms of which are embodied in the Act of 1880, was supported by a valuable consideration, and was a valid contract. (Brief pages 25 31.)

If it is true, therefore, that the Legislature of Maryland had the right, on behalf of the State of Maryland at the time of the passage of the Act of 1880, to determine that the ultimate decision to be made of the then matter in controversy between the State and the Company, was sufficiently a matter of doubt to make it wise to settle the controversy by securing the right in perpetuity to the payment of a partial tax by the Company rather than run the risk of all of its property being exempt from taxation, then, inasmuch as this was the import of the contract between the State and the Company, the fact

that the Court of Appeals of Maryland in the decision referred to, had decided this controverted question one way, *goes for naught* in determining whether the Legislature of Maryland had the power by the Act of 1880 to agree that the extent of taxation therein mentioned should be permanently the extent of such taxation.

It necessarily results from the foregoing that there is no foundation for the proposition of the Court of Appeals of Maryland in the opinion in the case now under review, that because the Court of Appeals of Maryland determined in the case of the State vs the Railway Company, in 44 Maryland, that all the rights enjoyed by the Railway Company under the Act of 1854 were subject to repeal or abrogation at the pleasure of the State, therefore the Legislature had no power by the Act of 1880 to make the irrepealable contract thereby made.

VI.

The next, and *main*, ground upon which the Court of Appeals in its opinion in the case now before this Court, places its decision that the Legislature of Maryland had no power by the Act of 1880, chapter 16, to make the irrepealable contract therein made with the Railway Company, is that the Court of Appeals of Maryland in the above-mentioned case of the State of Maryland vs. The Northern Central Railway Company, 44 Md. page 131, decided *that any form of law which grants to a corporation such corporate privileges as immunity from taxation is one passed pursuant to the said 48th section of Article 3 of the Constitution*, and is, therefore, *subject to alteration or repeal by future legislation.*

VII.

With the greatest respect to the Court of Appeals of Maryland I most confidently claim that in saying in

this case (Record, page 24 top) that the Court in the case in 44 Md., page 131, determined "that any form of law which grants to a corporation such corporate privilege as immunity from taxation is one passed pursuant to the section of the Constitution referred to, and is, therefore, subject to alteration or repeal by future legislatures," the Court fell into manifest error; and that an examination of the opinion of the Court of Appeals in the case in 44 Md. fully justifies the claim I now make.

The Court in that case, after giving a history of the circumstances attending the passage of the Act of 1854, Chapter 250, for the union of the Baltimore and Susquehanna Railroad Company with the other companies, out of which the Northern Central Railway Company was formed, and determining that up to the time of the union the Baltimore and Susquehanna Company by virtue of its charter had an entire exemption from all taxation under the laws of Maryland, then determined that whatever property, rights and privileges formerly belonged to the Baltimore and Susquehanna Company were vested in the new company, but that these rights and privileges became new and special grants to the Northern Central Railway Company, dating from the period when the Act of 1854 went into operation, and that the last-mentioned Company was not created by the articles of union which the several Companies were authorized to execute, but was created by the Act of 1854 itself; and after quoting the provisions of the Constitution of 1850 (by which it was provided that corporations may be formed under general laws, and, under special circumstances, by special act, and that all laws and special acts under which corporations should be formed may be altered from time to time or be repealed), and stating the object of such a provision in the Constitution of 1850, substantially in the lan-

guage used by this Court in the cases of Miller vs. The State, 15 Wallace, 478; Tomlinson vs. Jessup, 15 Wallace, 457, which cases the Court cites, the opinion proceeds as follows:

"The appellee having derived its charter under the Act of 1854, when the Constitution of 1850 was in force, and the exemption from taxation claimed, being a part of such charter, the power of the Legislature to repeal or revoke the immunity thus granted is, we think, too clear to be questioned. The fact that no such right was reserved in the Act of 1854, incorporating the appellee, can make no difference. The Constitution is the supreme and controlling law, and under its provisions the right to alter, amend or repeal every charter granted by the Legislature to a private corporation is reserved as fully as if such reservation had been made in the charter itself. Miller vs. The State, 15 Wallace, 478; Tomlinson vs. Jessup, 15 Wallace, 457; Fletcher vs. Peck, 6 Cranch, 136; Terrett et al. vs. Taylor et al., 9 Cranch, 51.

"To hold otherwise would be to decide that the Legislature by omitting such a reservation could confer a power beyond the interference of the Legislature, and thus exercise a power forbidden by the Constitution. The charter of the appellee must therefore be construed as if such reservation had been made in express terms by the Act of 1854. And if so, the case comes directly within the principle laid down in Washington County vs. Franklin Railroad Company, 34 Md. 160.

"In accepting the Act of 1854, and in the execution of the articles of union, under the operation of which the Baltimore and Susquehanna Railroad Company has merged and ceased to exist, the stockholders are presumed to have known that the corporate powers and privileges granted by that Act to the Northern Central Railway Company were subject to the provisions of section 47, article 3 of the Constitution, and that the exemption from taxation claimed under that Act was liable at any time to be repealed by the Legislature, whenever in its judgment the public interests required it. Be that however as it may, it was not within the power of the Legislature under the Constitution of the State to grant to the appellee immunity from taxation, or any other corporate privilege, beyond the power of a subsequent Legislature to repeal or revoke."

44 Md., page 65.

It will thus be seen that the Court decides (1) that the Railway Company having derived its charter under the Act of 1854, when the Constitution of 1850 was in force, the power of the Legislature to repeal the exemption from taxation which was a part of its charter, existed, by virtue of the provisions of the Constitution, to the same extent as if the power to repeal had been reserved in the charter itself; (2), that in accepting the Act of 1854 and in the execution of the articles of union therein referred to, the Baltimore and Susquehanna Railroad Company had merged and ceased to exist, and the *stockholders are presumed to have known that the corporate powers and privileges granted by that Act to the Northern Central Railway Company were subject to the provisions of the Constitution, and that the exemption from taxation was liable, at any time, to be repealed by the Legislature.* Having stated this second proposition, that is to say, the one involving the presumption and knowledge by the Stockholders, the Court adds, "*be that, however, as it may, it was not within the power of the Legislature under the Constitution of the State, to grant to the appellee immunity from taxation, or any corporate privilege, beyond the power of the subsequent Legislature to repeal or revoke.*"

Now it is perfectly manifest that all that the Court decides in the language which I have quoted, is that irrespective of what the Stockholders ought to have known as to the effect of the constitutional provision in question upon the right of the Legislature to repeal the tax exemption referred to, the Legislature of the State could not grant to the Northern Central Railway Company immunity from taxation, *or any other corporate privilege*, beyond the power of a subsequent Legislature to repeal or revoke; *because*, as the Court had already shown in the preceding part of its opinion, (1) the Constitution, which was in force at the time of the grant of the charter, declared that all

charters granted while that Constitution was in force were to be subject to alteration or repeal; and (2) the exemptions from taxation claimed by the Company *were derived by the direct grant of them made in the Act of 1854.* All that the Court therefore decides is that, where it is ascertained that the rights claimed by a company *exist only by virtue of a grant of them made in a charter granted during the existence of the provision of the Constitution which declares that all such grants are repealable*, then such rights are repealable by virtue of the Constitutional provision.

The sole foundation and basis of the determination made by the Court that the rights and privileges of the Company are subject to abrogation or repeal, is *the prior adjudication by the Court*, that they were derived by express grant from the State, made in an Act of the Legislature, passed at a time the provision of the Constitution was in force; thus announcing the familiar doctrine of this Court, and *basing its opinion upon a few of the many cases* in which this Court has established this principle of jurisprudence.

The Court neither decides, nor in any way intimates a decision upon, any other matter than the one just stated. And yet the Court of Appeals of Maryland in the opinion in the present case, after quoting the language from the previous opinion of its predecessors, upon which I have commented, says (Record, page 23 bottom), "It is to be observed that the Court does not rest the inability of the Legislature to grant to a corporation an irrepealable exemption from taxation, upon the form or character of the particular Statute then under consideration, but puts it upon the ground of want of power in the Legislature under the Constitution to make such a grant at all. The Court certainly in effect determines that any form of law which grants

to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the Section of the Constitution referred to, and is, therefore, subject to alteration or repeal of future Legislatures."

I respectfully submit that the interpretation thus put upon the language of the Court in the previous opinion, has been shown by me to be altogether unwarranted. The Court, in the opinion in 44 Md., neither decides, nor intimates in the remotest way an opinion upon, the question whether in a case where the question at issue *was whether the rights claimed by a corporation* (be it an exemption from taxation or any other right) were derived by a grant from the State made while the above mentioned constitutional provision was not in force, or existed independently of such grant, and so not coming under the constitutional provision in question, *a valid contract could be made by the State whereby a surrender was made by it of a part of its claims, in consideration of a surrender made by those claiming rights of a part of such rights.*

VIII.

(1) The judges of the Court of Appeals of Maryland having thus wrongly interpreted the decision made by their predecessors in the case in 44 Md., as determining that by virtue of the Constitutional provision contained in section 48 of Article 3, *any statute of the State* under which a contract is made by the State with any corporation upon the subject of taxation, is repealable at the pleasure of the State, makes this interpretation of the decision of their predecessors the *basis* of the *main ground* of their decision that the Act of 1880, chapter 16, was, notwithstanding its terms, repealable by any subsequent Legislature, and therefore, lawfully repealed by the Act of 1890, chapter 559. For immediately

following the above-mentioned erroneous interpretation of the decision in 44 Md., the Court says:

"*If this construction of the Constitution be correct*, how can we escape the conclusion that the Legislature of 1880 had no greater power, by the passage of the Act upon which the appellee bases its claim to a partial exemption from taxation, to grant that exemption in an irrepealable form, than the Legislature of 1854 had to grant a total exemption in like form by the Act which it passed and which this Court has held to be subject to repeal at any time? The appellee attempts to answer this query by calling attention to the fact that the Act of 1880 differs from that of 1854 in the essential particular that it, upon its face and especially in its preamble, professes to have been passed for the *purpose of adjusting and settling by agreement the controversies which were then pending between the State and the appellee in reference to the extent and validity of the claims of the latter to exemption from taxation*, and that the contents of the Act itself show that the appellee in accepting it and complying with its terms gave up a valuable right of appeal to the United States Supreme Court, and paid a large sum of money to the State, thus supplying a valid consideration which made the action of the State binding and permanent. Without going into the contents of the Act in detail or fully reciting the things done upon the faith of it by the appellee *it may be conceded that, if there were no constitutional difficulty in the way, the transaction between the State and the appellee as part of which the Act of 1880 was passed was one so far in the nature of a contract or agreement that neither party could abrogate it without the consent of the other.*

"The difficulty with the appellee's contention *is that the inability of the Legislature under the Constitution to make in 1880 a valid and irrepealable grant of such a corporate privilege as immunity from taxation did not rest upon the want of a suffi-*

cient consideration for the grant but upon the fundamental want of power in the Legislature to make it by reason of the provisions of the Constitution which is the supreme and controlling law of the land. It is plain, therefore, that the question of consideration *vel non* cannot be a controlling one in determining the question now at issue. If as this Court has decided in 44 Md. the appellee in executing the articles of union under the Act of 1854 must be presumed to have known that the privileges granted by that Act were subject to the provisions of the Constitution and repealable at any time, so must the appellee in accepting the provisions of the Act of 1880 be presumed to have known that the immunity from taxation granted by that Act was in like manner and for the same reasons subject to repeal by future Legislatures."

(2) It will be thus seen that the Court concedes (1) the correctness of the claim made by the Plaintiff in Error that the State and the Railway Company intended and supposed that by the Act of 1880, chapter 16, and compliance with its conditions, a contract in its nature permanent and irrepealable, had been made upon the terms and for the purposes therein set forth; and (2) that if the constitutional provision *did not inhibit the making of such an irrepealable contract*, it was made upon sufficient valuable consideration, and cannot be abrogated by the State any more than it can be abrogated by the Railway Company,

(3) It will be further seen that the Judges place the decision of the inability of the Legislature to make irrepealable the contract made between the State and the Company, *first and mainly*, upon the ground that their predecessors had decided in the previous case, that under no circumstances could a valid contract be made between the State, acting through its Legislature, and a corporation created by it upon the sub-

ject of taxation, which was not subject to alteration or abrogation by virtue of the constitutional provision referred to. Yet the present Court seems also to intend to give its own consent to the same doctrine.

(4) Upon the concession made by the Court, as above stated, we are entitled to consider that the sole question remaining for discussion is, whether the Constitution of Maryland prohibited the Legislature from making irrepealable the contract which it made with the Railway Company, by virtue of the Act of 1880, chapter 16.

IX.

The decision of the Court of Appeals we are now to examine is, that the Legislature could make, irrepealable, the contract it made with the Railway Company, by the Act of 1880, because under Section 48 of Article 3 of the Constitution of Maryland, it is not lawful for the Legislature to pass any law whereby there is made with any corporation created by it an irrepealable contract relating to the taxation of the property of the corporation, no matter under what circumstances, upon what consideration, or in what form, the contract *may be made.*

It is to be noted that where there is a Constitutional provision which makes Corporation Charters, granted during its existence, subject to alteration or repeal, the reservation has to do with all the rights, privileges and immunities derived by its Charter directly from the State. The immunity from taxation does not occupy any peculiar position in this regard.

(1) The above-mentioned section of the Constitution provides that "corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and

except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created. * * *

"*All charters granted or adopted in pursuance of this section, and all charters heretofore granted or created, subject to repeal or modification, may be altered from time to time or be repealed.*"

(1) It certainly must be admitted, that no corporate rights are within this provision of the Constitution, unless they are contained in charters granted subsequent to the adoption of the Constitution, or in charters, theretofore granted, which were subject to repeal or modification.

(2) There are in Maryland charters granted before the adoption of the Constitution of 1850 (which was the first Constitution which contained the provision of which we are now speaking), whose charters granted exemption of property from taxation, and contained no reservation of the right to alter or repeal them, and whose charters are therefore certainly irrepealable without their consent.

The best known of these corporations is the Baltimore and Ohio Railroad Company, chartered in the year 1826. A part of its railways consisted of the road leading to the city of Washington. By virtue of the charter relating to this part of its road (Act of Md. of 1832, chapter 175, section 8), it is required to pay to the State of Maryland, as a *bonus tax* (21 Wallace 473, B. & O. R. R. Co. vs. State of Md.), one-fifth of the gross receipts from its passenger travel thereon.

In the year 1878 the Legislature of the State and the Railroad Company, believed it for the best interests of all concerned, that a contract should be made between the Company and the State whereby all pending controversies between them should be settled. Accordingly there was passed the Act of Assembly of

Maryland of 1878, chapter 155. In the title it is declared to be an Act "*To adjust and settle finally by an agreement all pending controversies between the Baltimore and Ohio Railroad Company and the State of Maryland, by subjecting the franchises and property of said Company within the State to taxation for State purposes to a certain extent*, and by providing for the payment of a certain indebtedness of the Baltimore and Ohio Railroad to the State," etc.

It will be seen how closely the title resembles that of the Act of 1880, chapter 16.

By this Act it is provided (so far as it is relevant to my purpose to state its provisions) that all franchises and property of every description, and gross receipts of the Company within the State of Maryland should be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum on the gross receipts of its railroads and branches within the State, but to no further or greater extent or otherwise; that the State releases the Company from the obligation to pay the above-mentioned bonus tax of one-fifth of its gross receipts for the transportation of passengers over the Washington Branch of the Road, and in consideration of this release the Company consents that the contract contained in its charter for exemption from taxation of all of its property shall be so far modified as to subject its franchises and property of every description, and all of its gross receipts, within the State of Maryland, to taxation for State purposes to the extent of one-half of one per cent. on its gross receipts within the State.

Other provisions are made in the Act for ascertaining the indebtedness in the past growing out of the bonus tax of one-fifth of the gross receipts above mentioned, and certain other agreements are entered into by the Railway Company looking to the use of its lines by other Railroad Companies, and in reference

to the rates to be paid for transportation of certain articles of freight. Provision is also made for the acceptance of the Act by the stockholders of the company and for the release of all pending suits on behalf of the State against the Railroad Company brought to enforce the claims of the State against the Railroad Company.

It will thus be seen that in a contract made between the Railroad Company and the State (*in the making of which substantially the exact form of proceeding was taken as is embodied in the Act of 1889, chapter 16*), by which the State of Maryland *surrendered to the company a valuable right of taxation* which had been secured to it by that portion of the charter of the company which appertained to the Washington Branch of the railroad, and in part consideration of this surrender, the Railroad Company agreed to substitute, for the total exemption from taxation in reference to the remainder of its property granted to it in its charter, an agreement to pay in perpetuity a tax of one-half of one per cent. on its gross receipts in the State of Maryland.

(3) Now if the above-mentioned proposition of the Court of Appeals of Maryland, which I am now controverting, is tenable, this contract is subject to alteration or abrogation by the Legislature of Maryland at its pleasure. For it is clearly a contract made between the State and one of its corporations through the instrumentality of the Legislature of the State, whereby immunity from taxation of a part of its road is forever secured, in consideration of rights granted by the Company to the State of Maryland.

Is it true then, that the above-mentioned contract is subject to abrogation by the State, so that, among other consequences of such abrogation, the State would be restored to the right of the bonus tax of the one-fifth of the passenger rates on the Washington

Branch? If it is subject to abrogation by the State, why is it subject to abrogation? It is certainly not within the terms of the constitutional provision in question; for the charter of the Company was not granted subsequent to the adoption of the Constitution of 1867, nor was it when granted subject to modification or repeal.

Although then (to use the language of the Court of Appeals of Maryland in the part of its opinion which we are now considering) the Act of 1878 is "a *form of law which grants to a corporation such* a corporate privilege as "immunity from taxation" how could it be said to be "one passed pursuant to the section of the Constitution referred to, and is, therefore, subject to alteration or repeal by future Legislatures?" And yet the Court of Appeals says that *any form of law* which grants to a corporation such a privilege as immunity from taxation, *is one* passed pursuant to the Section of the Constitution referred to, and is therefore subject to alteration or repeal by future Legislatures.

It is demonstrated, therefore, I respectfully submit, that it cannot be true that *every* statute which authorizes a contract between the State and a corporation is a law coming within the constitutional provisions, and so repealable.

(4) As I have shown by the example of the Baltimore and Ohio contract above mentioned that it is not true that every contract made between the State and a corporation securing to the latter an immunity from taxation is made repealable by the Constitutional Provisions in question, the next inquiry is, is there anything in the nature of the subject of such a contract which deprives the Legislature of the right to make it irrepealable?

(5) It is axiomatic that in creating a Legislative Department, and conferring upon it the Legislative power, the people of Maryland must be understood to have conferred as full and complete power as vests in, or may be exercised by, the sovereign power of any country, subject only to such restrictions as they might have see fit to impose by the Constitution of the State, and subject, of course, to the limitations which are contained in the Constitution of the United States. Plenary power in the Legislature of the State for all purposes of civil government is the rule, and the prohibition to exercise a particular power is the exception.

Cooley on Cons. Lim,, page 104.
15 Md. 387, 388, 472, 473, Mayor and C. C. vs. State.
75 Md. 315, Jackson vs. Walsh.

(6) There is nothing in the Constitution of Maryland which prohibits the State from entering into contracts with corporations; the State may, therefore, by an Act of the General Assembly, approved by its Governor, make any contract upon valuable consideration which in its judgment would be promotive of the best interests of the people of the State; such a contract may be made as well with a corporation as with an individual; and whether the contract is one which it is for the best interests of the State should be made, the Legislature, with the approval of the Governor, has the absolute right to determine.

The only limitation upon this power to contract with a corporation is that which is contained in the Constitutional Provision we have been considering. That the contracts above mentioned may be made, as well upon the subject of taxation of such corporations, as upon any other subject, is well known to the Court, and has been often stated by it, and I have

put upon the brief—page , some of its cases upon this subject.

7. It necessarily follows then, that if a contract is made by the State with a corporation *regulating permanently* the subject of taxation of its property, this contract cannot be abrogated by the Legislature, unless it is a contract, made with a corporation, which comes within the terms of section 48 of Article 3 of the Constitution; and that it is not true that every contract made with a corporation regulating permanently the taxation of its property, which is one coming within this section.

I have shown that the contract made with the Baltimore and Ohio Railroad Company by the Act of 1878, does not come within the scope of the Constitutional provision, and that, therefore, for the reasons above stated, it is not repealable, *though it by its terms regulates the taxation of its property permanently.*

I have considered the contract between the Baltimore and Ohio Railroad Company and the State of Maryland (1) for the purpose of showing by a concrete example that, contrary to the position taken by the Court of Appeals of Maryland, a valid, irrepealable contract may be made by means of an Act passed by the Legislature of Maryland with a corporation *regulating permanently the extent of taxation of the property of that corporation:* (2) for the purpose of showing that the State has exercised this power in reference to one of its chief corporations (no intimation has ever been given that this contract is the subject of abrogation), and exercised it, shortly before the passage of the Act of 1880, Chapter 16; (3) for the purpose of showing the bearing of this contract upon the question of whether the contract made under the Act of 1880, Chapter 16, is within the

Constitutional provision in question, and so subject to abrogation by the Legislature of Maryland.

I proceed to make of the contract of the Baltimore and Ohio Railroad Company the use last above mentioned.

In doing so, I assume, (as I believe has been shown in the previous part of this Brief), that the Legislature of Maryland was clothed with adequate power to *determine conclusively* for the State of Maryland the question which by the passage of the Act of 1880, Chapter 16, it did assume to determine; that is to say, that the result of a Writ of Error prosecuted to this Court to bring up the question at issue between the Company and the State, as passed upon by the Court of Appeals of Maryland in the case in 44 Md., page 131, (which question was, whether the Northern Central Railway Company held the rights and privileges, including immunities from taxation which had been those of the Baltimore and Susquehanna Railroad Company, by virtue of a direct grant of them made to the Northern Central Railway Company in the Act of 1854, Chapter 250, or so held them by virtue of an irrepealable grant made of them to the Baltimore and Susquehanna Railroad Company.)

Because of the contract made by the Act of 1880, it never has been finally adjudicated, by that tribunal, to which the Railway Company had the Constitutional right to resort, that it held the immunity from taxation, (originally granted to the Baltimore and Susquehanna Railroad Company in a charter which was irrepealable under the decisions of the Court of Appeals of Maryland, as heretofore shown, by a grant from the State of Maryland which was repealable or amendable.) As long as that question remained unadjudicated finally with the pending right upon the part of the Company to have it finally

adjudicated, it had not been ascertained that this immunity was held subject to the power upon the part of the State to extinguish this immunity.

The Legislature saw fit to prevent the final adjudication above mentioned by the making of the contract set forth in the Act of 1880. If upon the prosecution of the writ of error to this Court, the prosecution of which was prevented by the State in assenting to the terms of the contract set forth in the Act of 1880, the contentions of the Railway Company had been sustained, the Company would now hold an exemption from taxation *of all its property in Maryland*, as granted to the Baltimore and Susquehanna Railroad Company, and it would hold them, not by virtue of any charter granted under the Constitution of 1867, or any other charter which, at the time of the adoption of the Constitution of 1867, was amendable: and its exemption from taxation would not be, therefore, subject to repeal or amendment under the Constitution of 1867.

In this condition of things the State, through a department of its government authorized to speak for it, instead of abiding by the *final judicial adjudication* of the question whether all the property of the company was forever exempt from taxation, or whether it was all forever subject to taxation, *determined that it was for the best interests of the State that this question should be finally settled by an agreement made by the parties.* It was simply a question appertaining to the revenue of the State, and whether it was better to *run the risk* of being forever deprived of all contribution from taxation of the property of the company, or whether it should secure *certainly* a contribution from that taxation although a less amount than if all the property of the company was subject to taxation. The doubt, which the Legislature authoritatively ascertained to exist on this question, was sufficient to authorize it to make a final settlement of the question, and upon

such terms as in its judgment was best for the interests of the State. The Legislature, on behalf of the people of the State of Maryland, had the indisputable right to determine this question. Accordingly the State made a contract with the company, whereby it surrendered a part of its claim, and thereby a part of the property of the company was forever made subject to taxation, and the company surrendered its claim that *all of its property was exempt from taxation*. The fact that these terms involved the agreement to accept *in perpetuity* from the company an obligation to pay tax to a certain extent, in consideration of the State's abandoning a claim for any greater payment by it, does not in any way impair the validity of the contract: because the Legislature had the clear right to speak for the State in making the terms.

The contract thus validly made was a substitution for the pre-existing claims of the State and of the company, and therefore the status of the company, including its rights and duties, are those fixed by the contract.

It must, therefore, remain forever undecided and unascertained that the Company derived all of its rights and privileges by virtue of the direct grant made by the State to the company in the Act of 1854.

It has not, therefore been *and because of the contract it cannot now be* ascertained that the immunity from taxation enjoyed by the Railway Company at the time of the passage of the Act of 1880 was held under a statute, which under the Constitution is amendable or repealable by the Legislature.

It cannot be, therefore, that this Court will adjudicate that from and after the passage of the Act of 1880, chapter 16, and *notwithstanding* that Act and the performance of its conditions and compliance with its terms, the Company holds its rights, privileges

and immunities, under and by virtue of the power reserved in the Constitution of Maryland to repeal or annul those rights, privileges and immunities: *for so to adjudicate would be to declare that it did so hold them, after the Legislature of Maryland had, by this contract, made upon valuable consideration and in the exercise of its best judgment for the interests of the State, deprived the company of an opportunity to show that it did not hold its rights, privileges and immunities under and by virtue of the Constitutional Provision above mentioned.*

So far as the subject we are now discussing is concerned, the only difference between the contract made by the State with the Baltimore and Ohio Railroad Company by the Act of 1878, and the contract made with the Northern Central Railway Company by the Act of 1880, is that in the case of the Baltimore and Ohio Railroad Company, the State *surrendered a tax upon a portion of the property* of the Company, to which tax the State was *indisputably entitled*, in consideration of the grant by the Company to the State of a right to tax a portion of its property which was indisputably exempt under its Charter. Whereas in the case of the Northern Central Railway Company contract, the State surrendered to the Company the right to tax a part of its property while it, the State, claimed the right to tax the whole of the property, in consideration of the surrender by the Railway Company of its claim that all of its property was exempt from taxation; and the State, through its Legislature, believed it to the best interest of the State that this contract and settlement should be made rather than have a final authorative adjudication of the respective claims of it and the Company.

X.

The Court of Appeals of Maryland in its opinion in the case now before this Court, says:

"The Act of 1880 is declared upon its face to be supplemental to that of 1854, and it grants to the appellee," (plaintiff in error here) "partial exemption from taxation in almost the identical words in which the former Act granted the complete exemption. The practical effect of the later Act upon the prior one, which is the charter of the appellee, was to so amend it as to substitute the partial for the complete exemption.

If this reference to the Act of 1880 is intended by the Court to show that the Act of 1880 is not to be treated as a contract between the State and the Company, it will be seen by looking to the whole title and the whole first section of the Act (this being the section to which the Court refers in the portion of its opinion above quoted), that as the contract agreed upon between the State and the Company was that a tax of one half of one per cent. upon the gross receipts of the Company was to be paid by the Company in perpetuity, and that this was to be accepted in lieu of all other taxes upon its property, *it was necessary in embodying this contract* in the Act that language should be used appropriate to put on the Statute books of the State the requisite provision to carry out the contract. It was absolutely necessary therefore to describe what the rights of the State and the Company were to be, as thus agreed on in the contract. The language of the first section is most appropriate for the above-mentioned purpose. It declares that the Northern Central Railway Company shall have and possess all the powers, rights, privileges and immunities, and be subject to all the duties and obligations which are expressed in the Act of Assembly of Maryland of 1827, chapter 72, entitled "An Act to incorporate the Baltimore and Susquehanna Railroad Company, *but all the franchises and property of every description and gross receipts of said*

Northern Central Railway Company, within the State of Maryland, shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon the gross receipts from its railroad and branches lying within the State of Maryland, and from all other sources within this State, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland.

And when it is declared in the *title* that the Act is supplemental to the Act of 1854, this *follows* the Declaration in the title that it is "an Act *to adjust and settle finally by agreement all pending controversies between the State of Maryland and the Northern Central Railway Company, by subjecting the franchises and property of said Company within the State to taxation for State purposes to a certain extent, and by providing for the payment of a certain indebtedness claimed by the State of Maryland to exist on the part of the Northern Central Railway Company to the State.*"

Inasmuch as the Act, to carry out this contract, necessarily dealt with the relations between the Company and the State; and as the subject of controversy between the parties was whether the Northern Central Railway Company did, or did not, possess, beyond recall by the State, the rights which had been those of the Baltimore and Susquehanna Railroad Company, among which was immunity from taxation, and it was the intent of the contract to determine to what extent those rights should exist in the Northern Central Railway Company and how far they should be modified, *it was entirely appropriate* to speak of the Act which was to embody this contract at once an Act to settle the controversies, and as an Act supplementary to the Act incorporating the Baltimore & Susquehanna Railroad Company. *No other rights were conferred on the Northern Central Railway Company than those which had been conferred upon it by the Act of 1854, Chapter 250;* all that was done in this regard by the Act of

1880 was to settle the question how far these rights were to remain irrepealably the rights of the Plaintiff in error, and upon what terms.

By reference to the Act of 1878, chapter 155, it will be seen that the frame work of that Act, and of the Act of 1880, is substantially the same, both being intended to embody a contract made between the State and the respective companies.

It is respectfully submitted that the First and Second Propositions of the Plaintiff in Error (Brief page 16) have been maintained. The Third and Fourth Propositions (Brief page 16) need no discussion, because the maintenance of the First and Second Propositions maintain the Third and Fourth Propositions. The Record fully shows, and it is undisputed that the Railway fully complied with all the things mentioned in the contract as the conditions upon which it was to become effective, and ever, thereafter, year by year, paid annually the tax of one-half of one per cent. upon its gross receipts.

The Plaintiff in Error respectfully asks that the judgment of the Court of Appeals of Maryland, December 7, 1900, (Record, page 39), may be reversed.

BERNARD CARTER,
For Plaintiff in Error.

No. 43.

Brf. of McComas for D. C.

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OCTOBER TERM, 1902.

No. 43.

THE NORTHERN CENTRAL RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

THE STATE OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE R. GAITHER,
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Counsel for Defendant in Error.

(18,037.)

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OCTOBER TERM, 1902.

No. 43.

THE NORTHERN CENTRAL RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

THE STATE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

A.

1. The defendant in error brought suit in the superior court of Baltimore city to recover from the plaintiff in error $13,142.35, this sum being a tax of 1 per cent. on the amount of the gross receipts of the plaintiff in error within the State of Maryland for the year ending January 31, 1896, with interest from July 1, 1896, together with 5 per cent. penalty for failure to pay within one month after the last-mentioned date.

The case was tried in said superior court of Baltimore city before Judge Stockbridge. On June 18, 1900, there was a verdict for the plaintiff (defendant in error) for $17,124.17 and judgment on verdict.

On June 20, 1900, the plaintiff in error appealed from the judgment. On December 7, 1900, by the Court of Appeals this judgment was affirmed and execution awarded for debt, interest, and costs. From this judgment the plaintiff in error has appealed to this court.

The assignment of errors committed by said court of appeals, in substance, is that by the act of the General Assembly of Maryland, 1880, chapter 16, and by the acceptance thereof by the plaintiff in error and the doing of the things required by the terms of said act by said plaintiff in error a valid contract upon legal and valuable considerations was entered into between the State of Maryland and the Northern Central Railway Company, whereby said State agreed that no tax should ever be imposed under the laws of said State upon the property, franchises, or gross receipts of said railway company, except an annual tax of one-half of 1 per cent. on the gross receipts of the company within said State.

That said contract was irrevocable except upon the consent of both parties to it, and so is within the protection of section 10 of the first article of the Constitution.

That the State of Maryland by the act of 1890, chapter 559, imposed a tax of 1 per centum per annum for each and every year, and so impaired said contract between the State of Maryland and said railway company.

And that by the judgment of said court of appeals of Maryland now to be reviewed it is determined and adjudged that said last-mentioned act validly imposed upon the plain-

tiff in error a tax of 1 per centum per annum upon its gross receipts in the State of Maryland, and that said last-mentioned act is not repugnant to said provision of the Constitution that no State shall pass a law impairing the obligation of contracts.

The judgment now to be reviewed involved the same questions, decided in the same case, between the same parties, decided by the same court in "The State of Maryland *v.* The Northern Central Railway Company, 90th Md., 497." The court of appeals then reversed the lower court and awarded a new trial. At the retrial of the case judgment was entered for the plaintiff (the defendant in error) and upon the second appeal of the defendant (the plaintiff in error) this judgment was affirmed, and for the error assigned is now sought to be reversed.

2. The question involved in this appeal is important to the State of Maryland. It involves the right of the State to impose the same tax upon the Northern Central Railway Company as is imposed upon other railroad corporations in the State. This suit claims only the tax upon the gross receipts of the plaintiff in error for the year 1896 at the rate of 1 per centum per annum. The question, however, involves the claim of the railroad company to an exemption from taxation for all State and county purposes forever at any rate exceeding half the present uniform rate imposed on all railroads operated by steam.

The tax of one-half of 1 per cent. levied annually upon the gross receipts within Maryland of all railroad companies worked by steam incorporated by Maryland and doing business therein originated with the act of 1872, chapter 234,

amended in particulars not material to be stated by the act of 1874, chapter 408. The Maryland Code, article 81, in section 146, contains this tax provision, and sections 147 to 154, inclusive, make provision for inquisition and collection of the tax.

The act of 1890, chapter 559, increased this tax from one-half of 1 per centum to 1 per centum upon such gross receipts, and the judgment in this case is for 1 per centum of the gross receipts of the plaintiff in error within the State of Maryland for the year ending January 31, 1896.

B.

THE ACT OF 1880, CHAPTER 16, IS NOT AN IRREPEALABLE CONTRACT, BUT WAS SUBJECT TO REPEAL BY A SUBSEQUENT LEGISLATURE.

THIS APPEARS FROM THE HISTORY OF THE CHARTERS OF AND OF THE TAX LAWS OF MARYLAND RELATING TO THE NORTHERN CENTRAL RAILWAY COMPANY.

In State *v.* Northern Central Railway Company, 44th Md., 131, 160, the Maryland court of appeals summarized such history.

The Baltimore and Susquehanna Railway Company was chartered in 1827 by the State of Maryland to construct a railroad from the city of Baltimore to the Susquehanna river. By the Maryland act of 1854, chapter 250, the stockholders of the last-mentioned company were authorized to unite and consolidate with "the York and Maryland Line Railroad Company," "the York and Cumberland Railroad Company," and "the Susquehanna Railroad Company," corporations chartered by Pennsylvania, so as to form one

corporation, "the Northern Central Railway Company," subject to certain conditions set forth in said act. Among others were these conditions:

That the consolidated company should have power to establish its capital stock to an amount not exceeding $8,000,000.

That the said company should possess all the corporate powers and privileges and be subject to all the duties and obligations, not inconsistent with the act and its general intent, which were expressed in the charter granted to the Baltimore and Susquehanna Railroad Company or in the supplements to that charter.

The act provided that it should go into effect whenever the several corporations had agreed to consolidate their several companies into one and had agreed upon the terms and conditions of such consolidation and had made a full report thereof, duly certified to the governor of Maryland, to be recorded in the office of the secretary of state.

Like power to consolidate with the Baltimore and Susquehanna Railroad Company was granted to the three Pennsylvania companies before mentioned by the legislature of that State. The act of 1854, chapter 250, was accepted in accordance with the terms of the act by the stockholders of the Baltimore and Susquehanna Railroad Company, and articles of union were executed by which all the property rights, privileges, and immunities belonging to the said several companies were transferred to the Northern Central Railway Company.

By the charter of the Baltimore and Susquehanna Railroad Company the act of 1827, chapter 72, section 20, it was provided that the shares of the capital stock of the said

company should be deemed and considered personal estate and be exempt from the imposition of any tax or burthen.

In State *v.* Northern Central Railway Company, 44th Md., 162, it was therefore claimed by the present plaintiff in error that as the act of 1854, chapter 250, provides that the Northern Central Railroad Company should possess the corporate powers and privileges granted to the Baltimore and Susquehanna Railroad Company by the act of 1827, chapter 72, it follows that the capital stock which the Northern Central Railway Company was authorized to issue under the act of 1854, chapter 250, is exempt from taxation, and, since the shares of stock represent all the property of the company, all such property is also exempt, and the question in 44th Md., 162, was whether the exemption thus claimed was beyond the power of the legislature to repeal.

C.

THE COURT OF APPEALS OF MARYLAND IN STATE V. NORTHERN CENTRAL RAILWAY COMPANY, 44TH MD., 162, DECIDED THAT IT WAS NOT WITHIN THE POWER OF THE LEGISLATURE UNDER THE STATE CONSTITUTION OF 1851 TO GRANT TO THIS COMPANY IMMUNITY FROM TAXATION OR ANY OTHER CORPORATE PRIVILEGE BEYOND THE POWER OF A SUBSEQUENT LEGISLATURE TO REPEAL OR REVOKE.

THAT ITS CHARTER EXEMPTION FROM TAXATION (ACT 1854, CHAPTER 250) WAS REPEALED, AND A STATE TAX OF ONE-HALF OF 1 PER CENTUM UPON THE GROSS RECEIPTS WAS VALIDLY IMPOSED UPON THIS COMPANY.

In the last-mentioned case it was held—

That under the State constitution then in force the charter of the Baltimore and Susquehanna Railroad Company, the act

of 1827, chapter 72, must be regarded as an executed contract between the State and the corporators, the obligation of which contract the State could not impair by any law.

That by the act of 1854, chapter 250, when accepted by the stockholders, the Baltimore and Susquehanna Railroad Company was merged into the Northern Central Railway Company, to which it had transferred all its rights and property. Its capital stock having been extinguished, its board of directors having ceased to exist, all its corporate powers and privileges vested in the consolidated company and the Baltimore and Susquehanna Railroad Company as a corporation ceased to exist.

That in its place and in the place of the three Pennsylvania companies a new corporation was created. The corporate rights and privileges of the Baltimore and Susquehanna Railroad Company and the provisions of the act of 1827, chapter 72, were to that extent embodied in and reenacted by the act of 1854, chapter 250. The rights and privileges thus conferred became new and special grants to the Northern Central Railway Company, but in no sense was the Northern Central Railway Company created by the articles of union executed by the respective companies. The acceptance by the stockholders of the act of 1854, chapter 250, and the execution of the articles of union were conditions precedent to the incorporation of the new company, and when these conditions were complied with the Northern Central Railway Company as a corporation derived its existence and was in terms created by the operation of the act of 1854, chapter 250.

That when this last-mentioned act was passed the constitution of 1851 was in force in Maryland and ordained "that

corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes; and in cases where in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section, may be altered from time to time or repealed," &c. (sec. 47, art. 3). The constitutions of 1864 and 1867, hereafter mentioned, each contains a similar provision:

That the Northern Central Railway Company deriving its charter from the act of 1854 when the constitution of 1851 was in force and the exemption from taxation claimed being a part of such charter, the power of the legislature to repeal or revoke the immunity thus granted is too clear to be questioned. That under the provisions of the constitution quoted the right to alter, amend, or repeal every charter granted by the legislature to a private corporation is reserved as fully as if such reservation had been made in express terms in the charter itself.

That it was not within the power of the legislature under the constitution of 1851 to grant to the Northern Central Railway Company immunity from taxation or any other corporate privilege beyond the power of a subsequent legislature to repeal or revoke.

That the act of 1866, chapter 157, provides in general terms for the taxation of all property in the State and repeals all laws exempting property from taxation.

That the act of 1870 provides: "That all and every provision contained in the charter, or supplements thereto, of any railroad company incorporated by the laws of this

State, or contained in any law heretofore passed by the legislature of this State, whereby the stock or property, real or personal, of any railroad company * * * is exempted from taxation, be, and the same is hereby repealed."

That the act of 1872, chapter 234, provides "that a State tax of one-half of one per centum be, and the same is hereby, levied annually upon the gross receipts of all railroad companies worked by steam."

That the provisions of the three several acts before referred to are repugnant to and inconsistent with the continuance of the exemption from taxation granted to the Northern Central Railway Company by the act of 1854, chapter 250, and must be construed as a repeal of the provisions of said act of 1854, under which the immunity from taxation claimed by the Northern Central Railway Company is derived, and therefore the tax imposed by the act of 1872, chapter 234, upon the gross receipts of the company was a valid tax.

Therefore the judgment in 44th Md., 169, in favor of the Northern Central Railway Company was reversed by the court of appeals, and the case was sent back in March, 1876, to be retried in the superior court of Baltimore city, where the case was pending at the time the act of 1880, chapter 16, was passed.

D.

THE ACT OF 1880, CHAPTER 16, IS A SUPPLEMENT TO THE CHARTER OF THE NORTHERN CENTRAL RAILWAY COMPANY, THE ACT OF 1854, CHAPTER 250. IT IS NOT BEYOND THE POWER OF SUBSEQUENT LEGISLATURES TO ALTER OR REPEAL.

1. The Maryland constitution of 1867, article 3, section 48, ordains that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created, and any act of incorporation passed in violation of this act shall be void." * * * "All charters granted or adopted in pursuance of this section and all charters heretofore granted and created, subject to repeal or modification, may be altered from time to time or be repealed."

The Maryland act of 1880, chapter 16, is in the transcript of record, pp. 12, 13, 14. In its title it is described as "*An act supplementary to the act of eighteen hundred and fifty-four, chapter two hundred and fifty,* entitled An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company by the name of the Northern Central Railway Company." It is true the title, besides describing this statute as an act supplementary to the charter of the plaintiff in error, "the act of 1854, chapter 250," describes this supplementary act as "An act to adjust and settle finally by agreement all pending controversies

between the State of Maryland and the Northern Central Railway Company." But the title characterizes the act as supplementary to the charter—to that act which was held by the court of appeals in 44th Md., 163, to constitute the charter of the Northern Central Railway Company. If the act of 1854, chapter 250, be not its charter, the Northern Central Railway Company for a half century has done business without a charter. The constitutional requirement that every law shall embrace but one subject and that shall be described in the title is satisfied if the supplemental act identifies the original act by its title and declares the purpose to amend or supplement it. If there be a doubt from the act itself, the title makes plain the intent that this statute is an act supplementary to the charter, as Chief Justice Marshall, 2d Cranch, 358, 386, said: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

The Maryland court has thus recently stated the rule of construction: "While the title will not be permitted to control the express language of the act, yet if the language be somewhat obscure or doubtful it may be considered to aid in the interpretation of the act, and thereby give to the enacting clause a meaning consistent rather than at variance with the clear title of the act" (State *v.* Archer, 73 Md., 44.)

The best answer to an ingenious argument which bases the alleged contract and its consideration upon the language of the preamble is in The Yazoo Railroad Company *v.* Thomas, 132 U. S., 174, 188: "The preamble is no part of the act; it cannot enlarge or confer powers, nor control the words of the act unless they are doubtful or ambiguous."

2. IT IS DOUBTFUL WHETHER THE ACT OF 1880, CHAPTER 16, THE SUPPLEMENT TO THE CHARTER, ACT OF 1854, CHAPTER 250, GRANTED ANY EXEMPTION FROM TAXATION; TAXATION IS THE RULE, EXEMPTION IS THE EXCEPTION; IT WILL NOT BE ENLARGED BY CONSTRUCTION.

IT IS SUBMITTED THAT SAID ACT DID NOT GRANT AN IRREPEALABLE EXEMPTION FROM TAXATION.

If the act of 1880, chapter 16, be a public grant, it must be strictly construed. Nothing can be taken against the State by presumption or inference. The intent of the legislature to confer the immunity from taxation or limit the amount or rate of taxation must be clear beyond a reasonable doubt. The established rule is that immunity not expressly granted is reserved.

The act of 1880, chapter 16, is plain and unambiguous. Not the preamble, but the enacted sections, must contain the contract if there be a contract. If it be urged, as it must be, that the act contains the contract of exemption and that it is plain and unambiguous, "the preamble cannot enlarge or confer powers nor control the words of the act;" cannot import a consideration into the act, cannot add a term to the contract, cannot make a contract, if the act does not contain the contract of exemption.

If there be a limited exemption from taxation *forever* and it be irrepealable, it is to be found in the first section of the act, which reads thus (Record, p. 13): "*Be it enacted by the General Assembly of Maryland*, That the Northern Central Railway Company shall have and possess all the powers, rights, privileges, *and immunities*, and be subject to all the duties and obligations which are expressed in the act of as-

sembly of Maryland of eighteen hundred and twenty-seven, chapter seventy-two, entitled An act to incorporate the Baltimore and Susquehanna Railroad Company, but all the franchises and property of every description and gross receipts of said Northern Central Railway Company, within the State of Maryland, shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon the gross receipts from its railroad and branches lying within the State of Maryland, and from all other sources within this State, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland; *provided however* that all such property works and structures of the said Northern Central Railway Company, which are or may be taxable within the meaning of the decision of the court of appeals of Maryland rendered in the year eighteen hundred and seventy-eight in the case of the State of Maryland against the Baltimore and Ohio Railroad Company, shall be subject to taxation for county and municipal purposes in the same way and to the same extent as the property of individuals."

Is there an exemption herein? If there be, is there an exemption for all time? Is there a plainly expressed intent never to amend or repeal it? In Covington *v.* Kentucky, 173d U. S., 231, 238, the act by which it was claimed that a certain exemption from taxation was granted to the city of Covington "in its proprietary, as distinguished from its governmental character," the grant of exemption was far more favorable than the alleged grant of exemption in this act (1880, ch. 16), yet Mr. Justice Harlan said: "We are of the opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of

Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation." * * * "There was in the act no 'plainly expressed' intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, etc., * * * should be *forever* exempt from State, county and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired."

The words contained in the act of 1880, chapter 16, upon which this exemption is claimed, provide that the company "shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon its gross receipts from its railroad and branches lying within the State of Maryland, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland," coupled with a proviso regarding taxation for county and municipal purposes. The meaning of the word "extent" is primarily dimension or degree; the limit, compass, or range. It is submitted that these words "shall be subject to taxation for State purposes *to the extent* of an annual tax of one-half of one per centum upon gross receipts" *do not constitute a perpetual exemption from any higher tax.* The only remaining words are, and these constitute plainly what was intended by the exemption, that the franchises, property, and gross receipts of said company shall not be subject to "any other tax under the laws of the State of Maryland." It is clear from the text of the proviso that *this* "OTHER TAX" *means an immunity from taxation for county and municipal purposes.* One of the important questions

raised by the company as to its liability was regarding county and municipal taxation. It would be a forced construction to give to the word "other" a different meaning from its ordinary acceptation, and construe it as equivalent to the word "greater," as applicable to taxation for State purposes, which is the subject of this taxation upon the gross receipts. That the words "any other tax" were intended to apply to county and municipal taxation is a reasonable and proper construction. It is not reasonable, we submit, nor within the strict construction of tax exemptions by this court, to construe these two phrases as indicating an intent of the legislature that no further or different tax should be subsequently levied. "When the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power" (146 U. S., 279, 294, *ubi supra*). "An immunity from taxation by a State will not be recognized unless granted in terms too plain to be mistaken," said Mr. Justice Parkham in Phœnix Insurance Co. *v.* Tennessee, 161 U. S., 174, 177.

By reference to the original charter of the Northern Central Railway Company, the act of 1854, chapter 250, it will appear that the clause therein conferring corporate powers upon the company is in the identical language of the grant set forth in the above first section except that the act of 1880, chapter 16, section 1, adds the word "immunities" to the charter rights and privileges, and then at length confers the alleged exemption claimed by the plaintiff in error. This grant of "immunities" makes this a supplement to the charter. The alleged exemption on its face is merely an imposition upon the Northern Central Railway Company of the same tax upon gross receipts imposed upon all rail-

roads worked by steam. The fair meaning from the context of the clause "and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland" is that the company shall not be subject to any other tax, county or municipal, except such county or municipal tax as is permitted by the proviso to this section, *that no other mode of taxation under existing law* should be applied to this company, and the tax on gross receipts should be in lieu of all other taxes for State purposes. It is plain that "any other tax under the laws of the State of Maryland" *means existing laws, laws in force.* The proviso which concludes the section limits the words above "any other tax" and subjects property works and structures of this company to taxation for county and municipal purposes in the same way as the property of individuals, *speaks of existing laws.* Nothing suggests an exemption from taxation under the laws which may be passed hereafter or the intent to exempt the company from different taxation under future revenue laws. This first section which confers the alleged exemption from taxation contains words of current law and not of irrepealable contract. There are no words of contract or agreement, but instead words of express grant of powers, privileges, and immunities usual in charters or amendments to charters.

Sections second and third of this act provide for the payment of $29,762.66, stated to be the total due for State taxes by said company up to December 31, 1879. These sections require the payment of one-half of 1 per centum of gross receipts, a full compliance with the requirements of existing revenue laws.

Section 4 makes plain that this act is a supplement to

the charter of the company. It follows the method prescribed by the charter, the act of 1854, chapter 250. It requires that the *acceptance of this act shall be made by the stockholders of the company at a general meeting of the same, "the acceptance to be evidenced by an instrument in writing under the corporate seal of said company which shall be filed in the office of the secretary of state of Maryland."*

This section clearly indicates the intent of the legislature to regard this act as an amendment to the charter. It is the same method whereby the legislature required the stockholders to evidence the acceptance of the charter, 1854, chapter 250. The usual mode of accepting an amendment of a charter is by a vote of the stockholders.

Since the acceptance of the charter by a vote of the stockholders was required by the act of 1854, chapter 250, and the legislature, by act of 1880, chapter 16, granted "immunities" and imposed a State tax of one-half of 1 per centum by the latter act, which is in terms an act supplementary to the former act, the legislature understood that the amendment to the charter should be accepted in the same manner as the charter itself had been, by a vote of the stockholders. The legislature understood that, although acceptance of an amendment to a charter might be inferred from an exercise of the powers granted, customarily acceptance should be proved by a vote of the stockholders. A charter is a contract; the amendment of that charter is an alteration of that contract. It was reasonable to require the acceptance of both to be evidenced in the same manner—by a vote of the stockholders.

If the claim of the plaintiff in error that this act made an irrepealable contract upon considerations before recited

in this act were well founded, the remaining sections would reasonably give a pledge of immunity from a different method or greater rate of taxation in the future, or prohibit the like. Instead, section 5 (Record, p. 14) enacts that upon the compliance of the company with the provisions of the third and fourth sections of this act, all claims for the unpaid State taxes are discharged, all suits being dismissed. The sixth section is not material here.

In all six sections what is there to suggest a contract exempting the company from any future additional tax? The act is a provision amending the charter and conforming its immunities to current revenue laws. In the words of this court in The Delaware Railroad Tax, 18th Wallace, 206, 226:

"That provision is not accompanied with any words indicating the intent of the legislature that no further or different tax should not be subsequently levied. Had the provision in question been embodied in an independent act, no one would pretend that the designation of the amount and character of the tax carried with it any implication that the tax should remain unchanged in these particulars for all future time during the existence of the corporation."

E.

TESTED BY THE WELL-SETTLED RULE SO OFTEN REITERATED BY THIS COURT, THE ACT OF 1880, CHAPTER 16, DOES NOT CONSTITUTE AN IRREPEALABLE IMMUNITY FROM ADDITIONAL OR GREATER TAXATION. A FEW OF THE RECENT STATEMENTS OF THIS RULE OF CONSTRUCTION ARE HERE QUOTED.

In Citizens' Savings Bank *v.* Owensboro, 173 U. S., pp. 634, 644, Mr. Justice White said: "In effect, it is that the contract was not subject to repeal, although the contract itself in express terms declares that it should be so subject at the will of the legislative authority. The elementary rule is that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it from being irrevocable."

In Covington *v.* Kentucky, 173 U. S., p. 231 (238, 239), Mr. Justice Harlan said: "There was in the act no 'plainly expressed' intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they were situated, should be forever exempt from State, county, and city taxes. But such a provision falls short of

a plain expression by the legislature that at no time would it exercise the reserved power amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture."

In Ford *v.* Delta and Pine Land Company, 164 U. S., pages 662, 666, Mr. Justice Brewer said: "It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim for exemption can be sustained unless within the express letter of the necessary scope of the exempting clause" (and cases cited).

In Yazoo Railroad Co. *v.* Thomas, 132 U. S., pages 175, 185, Mr. Chief Justice Fuller said: "And the court took occasion to reiterate the well-settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended

beyond the exact and express requirements of the language used, construed *strictissimi juris*."

And again the Chief Justice said in Wilmington and Weldon Railroad *v.* Alsbrook, 146 U. S., 279, 294: "The applicable rule is too well settled to require exposition or the citation of authority. The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power."

In Hoge *v.* Railroad Co., 99 U. S., pp. 348, 354, Mr. Justice Fields said: "The power of the legislature of a State to exempt particular parcels of property of individuals or of corporations from taxation, not merely during the period of its existence, but so as to be beyond the control of the taxing power of succeeding legislatures, has been asserted in several cases by this court, although against this doctrine there have been earnest protests by individual judges. But though this power is recognized, it is accompanied with the qualification that the intention of the legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise as to the intent of the legislature, it must be solved in favor of the State."

F.

IF THE AFOREGOING CONSTRUCTION OF THE ACT OF 1880, CHAPTER 16, BE CORRECT, THE RECORD INVOLVES SOLELY AN INTERPRETATION OF THE CONTRACT AND PRESENTS NO FEDERAL QUESTION FOR REVIEW.

If our construction of the act of 1880, chapter 16, be correct, even though the court of appeals gave a judgment of like effect, though upon other grounds; if by the just interpretation of the alleged contract there was no exemption from taxation, then there is no Federal question to be here reviewed. If there was no exemption, then the act of 1890, chapter 559, did not repeal the exemption which did not exist. If there was an exemption, it was not irrepealable and it was repealed.

It is within the principle, if not the expression, in St. Paul Gas Co. *v.* St. Paul, 181 U. S., 151: "As it is apparent that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows *that the record involves solely an interpretation of the contract*, and, therefore, presents no controversy within the jurisdiction of this court."

G.

ASSUMING FOR ARGUMENT SAKE THAT THE MARYLAND LEGISLATURE OF 1880 HAD THE POWER TO MAKE AN IRREPEALABLE CONTRACT FOR A GOOD AND SUFFICIENT CONSIDERATION TO EXEMPT THE NORTHERN CENTRAL RAILWAY FROM TAXATION, NEVERTHELESS THE TERMS OF THE ACT OF 1880, CHAPTER 16, AND THE FACTS IN EVIDENCE SHOW THAT THERE WAS NO LEGAL OR VALUABLE CONSIDERATION FOR SUCH CONTRACT.

A charter is a contract between the corporators and the State made upon valid and sufficient consideration. The Northern Central Railway Company had for thirty-six years as a corporation possessed and exercised the powers, rights, and privileges granted by the act of 1854, chapter 250, declared by the court of appeals in 44th Md., 163, to be its charter.

The only possible considerations for the contract of exemption claimed are found in the preamble. If, as we contend, the act be plain and unambiguous, "the preamble is no part of the act. It cannot enlarge nor control the words of the act unless they are doubtful or ambiguous." If we assume the act to be doubtful or ambiguous, then the plaintiff in error may claim there are three considerations moving from the railroad company, and that, severally or all together, they constitute a legal or valuable consideration for the alleged contract of the company with the State:

1. The controversy between the company and the State respecting the exemption from taxation granted the company by its charter.

2. The right to have the question at issue between the company and the State carried to the Supreme Court, there to be decided.

3. The payment of the sum of $29,762.56.

(*a.*) This alleged contract is in writing, wherefore only such consideration as is set forth in the written instrument, the act of assembly, could be taken to be proved in the transaction in the court below. Where a different kind of consideration cannot be proven only a failure of consideration can be shown.

(*b.*) The written words do not make the controversy a consideration; the written words merely recite the transaction and the willingness of one disputant to pay in accordance with the existing tax laws and admitting its willingness to pay the amount due thereunder.

"A plea stating merely that the amount was in dispute, and that the debtor agreed to pay it in consideration of a promise by the creditor does not set forth a sufficient consideration" (Emmettsburg Railroad Company *v.* Donoghue, 67 Md., 383).

(*c.*) The payment of the sum of $29,762.56 is expressly stated to be in full satisfaction and discharge of all claims arising under the laws of Maryland for taxes against the company up to December 31, 1879. As the record shows, the court of appeals had decided four years before that the company was liable for these taxes. The amount of tax and the manner of its ascertainment were not in dispute. An agreement to take a less sum than the debt is not a good

consideration for another promise for the payment of the residue.

"Payment of part of a debt is neither in law nor in equity a good consideration for abandoning claim for the residue" (Gurley *v.* Hiteshue, 5 Gill, 217).

"An agreement to relinquish the interest due on the debt to obtain payment of the principal is without consideration, and the creditor may recover such interest" (67 Md., *supra*).

(*d.*) The remaining claim is the right to carry the question at issue between the company and the State to the Supreme Court for decision. The alleged contract is a claim of exemption from taxation, and therefore to be most strictly construed in favor of the State. From the undisputed evidence it appears that at the time when the alleged contract was made there was no subsisting right of the railroad company to carry this question to the Supreme Court. At that time the case had not been prosecuted to judgment in the lower court. No writ of error to the Supreme Court would lie until the entry of the judgment in the lower court and until after its affirmance by the court of appeals. Strictly this claim is no legally sufficient consideration to support the alleged contract. The legislature has no judicial functions. The court of appeals had decided that the company was liable to pay the tax. If the Supreme Court be of the same opinion, then there was no doubt upon the question at the time the law was enacted.

If there be no consideration the exemption is a mere gratuity, revocable at the pleasure of the legislature. It has no higher character, because one of the parties was a State,

the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed, or recalled at pleasure (Tucker *v.* Ferguson, 22d Wallace, 527, 574; Appeal Tax Court, etc., *v.* Grand Lodge, etc., 50th Md., 429).

H.

THE COURT OF APPEALS IN 44TH MARYLAND HAVING DECIDED THAT THE CHARTER EXEMPTION FROM TAXATION OF THE NORTHERN CENTRAL RAILWAY COMPANY HAD BEEN VALIDLY REPEALED, IF THAT DECISION NOT APPEALED FROM BE A CORRECT STATEMENT OF THE LAW, THEN A CONTRACT BY 1880, CHAPTER 16, TO EXEMPT THIS ONE RAILROAD OPERATED BY STEAM FROM THE UNIFORM TAX IMPOSED UPON ALL OTHER RAILROADS OPERATED BY STEAM WOULD BE A VIOLATION OF SECTION 15 OF THE BILL OF RIGHTS OF THE MARYLAND CONSTITUTION AND OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The court of appeals of Maryland has interpreted the 15th section of the bill of rights as requiring tax laws to be uniform so as to operate equally upon all persons in similar circumstances. In State *v.* P. R. R. Co., 40th Md., 50, the court said: "It was not deemed a sufficient guarantee that no tax should be imposed but by the representatives of the citizen in the legislature, but in order to prevent abuse of the power, which would otherwise be unlimited, *the legislature is required to cause all public taxation for the support of the government to be fair and equal in proportion to the value of the property assessed, so that no class or species of property shall be unequally or unduly taxed.* And this declaration of the

right of the citizen is not simply directory to the legislature, to be observed or not as that department of the government may determine or think proper; but it is a positive limitation or restriction on the power, *and whenever it is transcended or disregarded, it becomes the duty of the courts to declare the act void.* Hence this court has repeatedly declared that taxes, if imposed in violation of this fundamental rule, would be illegal and void."

The Supreme Court says the fourteenth amendment does impose a practical and effective restraint against unequal taxes upon property of the same kind in the same condition *and used for the same purpose. It requires that the power of taxation shall be exercised impartially and by equal laws, and that taxes shall be imposed proportionately upon all persons and corporations properly within the same class, owning like property, or exercising like rights under substantially similar conditions.* As was said by Mr. Justice Matthews in the Kentucky railroad tax cases, 115 U. S., 321, 337, "the rule of equality in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances," or, as Chief Justice Fuller said in Giozza against Tiernan, 148 U. S., 657, 662, "it is enough that there is no discrimination in favor of one as against another of the same class."

Therefore if the Maryland court in 44th Md. rightly decided that the tax exemption of this company had been validly repealed, and if then by 1880, chapter 16, the State entered into a contract with this company, a railroad operated by steam, chartered since the constitution of 1851 and in reference to which the power of the State to tax is un-

questionable, and subsequently this company proposed to pay arrears of taxes at the same rate annually paid by other railroads operated by steam, and thereupon the State made a contract that thereafter this railroad operated by steam should be subject to a rate of taxation lower than the rate to which other railroads operated by steam might become subject, and thereafter the State did impose half the rate upon this railroad and the whole rate upon all other railroads operated by steam, is it not manifest that such a contract would be void under the provision of the Maryland bill of rights heretofore mentioned and a violation of the clause of the fourteenth amendment prohibiting a State from denying to any person the equal protection of the laws?

I.

THE SUPREME COURT EXERCISES AN INDEPENDENT JUDGMENT, BUT WILL RESOLVE ANY REASONABLE DOUBT IN FAVOR OF THE CONSTRUCTION OF THE CONSTITUTION AND THE STATE STATUTES WHICH HAS BEEN ADOPTED BY THE COURT OF LAST RESORT IN THAT STATE.

THE MARYLAND COURT OF APPEALS HAS UNIFORMLY HELD IN RESPECT TO THE RIGHT "TO REPEAL, ALTER, OR AMEND," UNDER THE CONSTITUTIONS OF 1851 AND 1867, THAT ANY STATUTE WHICH GRANTS TO A CORPORATION IMMUNITY FROM TAXATION, WHETHER IT BE A CHARTER, AN AMENDMENT TO A CHARTER, OR A LEGISLATIVE CONTRACT, IS A STATUTE PASSED SUBJECT TO THIS CONSTITUTIONAL RIGHT, AND THEREFORE SUBJECT TO ALTERATION OR REPEAL BY SUBSEQUENT LEGISLATURES.

1. The court of appeals in the clear and able opinion of Schmucker, J., in The State of Maryland against The North-

ern Central Railway Company, 90th Md., 447, says: "This court in the opinion in the case in 44th Md. in commenting upon the effect of the constitution of 1851, upon the act of 1854, say: 'In accepting the act of 1854 and in the execution of the articles of union under the operation of which the Baltimore and Susquehanna railroad has merged and ceased to exist, the stockholders are presumed to have known that the corporate powers and privileges granted by that act to the Northern Central Railway Company were subject to the provisions of sec. 47, art. 3, of the constitution and that the exemption from taxation claimed under that act was liable to be repealed by the legislature whenever in its judgment the public interest required it. *Be that, however, as it may, it was not within the power of the legislature under the constitution of the State to grant to the appellee immunity from taxation or any other corporate privilege beyond the power of subsequent legislatures to repeal or revoke.' It is to be observed that the court does not rest the inability of the legislature to grant to a corporation an irrepealable exemption from taxation upon the form or character of the particular statute then under consideration, but puts it upon the broad ground of want of power in the legislature under the constitution to make such a grant at all. The court certainly in effect determines that any form of law which grants a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to, and is therefore subject to alteration or repeal by future legislatures.*

If this construction of the constitution be correct, how can we escape the conclusion that the legislature of 1880 had no

greater power, by the passage of the act upon which the appellee bases its claim to a partial exemption from taxation, to grant that exemption in an irrepealable form, than the legislature of 1854 had to grant a total exemption in like form by the act which it passed and which this court has held to be subject to repeal at any time? The appellee attempts to answer this query by calling attention to the fact that the act of 1880 differs from that of 1854 in the essential particular that it, upon its face and especially in its preamble, professes to have been passed for the purpose of adjusting and settling by agreement the controversies which were then pending between the State and the appellee in reference to the extent and validity of the claims of the latter to exemption from taxation, and that the contents of the act itself show that the appellee in accepting it and complying with its terms gave up a valuable right of appeal to the United States Supreme Court, and paid a large sum of money to the State, thus supplying a valid consideration which made the action of the State binding and permanent. Without going into the contents of the act in detail or fully reciting things done upon the faith of it by the appellee, it may be conceded that, if there were no constitutional difficulty in the way, the transaction between the State and the appellee, as part of which the act of 1880 was passed, was one so far in the nature of a contract or agreement that neither party could abrogate it without the consent of the other.

The difficulty with the appellee's contention is that the inability of the legislature under the constitution to make in 1880 a valid and irrepealable grant of such a corporate privilege as immunity from taxation did not rest upon the want of a suffi-

cient consideration for the grant, but upon the fundamental want of the power in the legislature to make it by reason of the provisions of the constitution, which is the supreme and controlling law of the land. It is plain, therefore, that the question of consideration *vel non* cannot be a controlling one in determining the question now at issue. If, as this court has decided in 44th Md., the appellee, in executing the articles of union under the act of 1854, must be presumed to have known that the privileges granted by that act were subject to the provisions of the constitution and repealable at any time, so must the appellee, in accepting the provisions of the act of 1880, be presumed to have known that the immunity from taxation granted by that act was in like manner and for the same reasons subject to repeal by future legislatures."

2. We submit that the decision of the Maryland court of appeals that:

1. The act of 1854, chapter 250, created a new corporation, the plaintiff in error.

2. That it was not within the power of the legislature under the constitution of 1851 to grant to the plaintiff in error immunity from taxation by any form of law beyond the power of a subsequent legislature to repeal or revoke.

3. That by sundry revenue laws the exemption from taxation in the charter of plaintiff in error was repealed.

4. That a State tax of one-half of 1 per centum of the gross receipts was lawfully assessed and payable (for the year sued for) by the plaintiff in error.

5. That none of these statutes were laws impairing the obligation of contracts.

6. That the act of 1890, chapter 16, is a supplement to the charter of the plaintiff in error granting a partial exemption from taxation.

7. That the same constitutional provision respecting "alteration or appeal" was in force when the charter and when the supplement to the charter were enacted, and no irrepealable grant of exemption from taxation was within the competency of the legislature to enact either time.

8. That any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to, and therefore subject to alteration or repeal by subsequent legislatures.

9. That this rule applies whether 1880, chapter 16, be considered an amendment to the charter of or a legislative contract with the plaintiff in error.

10. That for this reason the question of a legal or valuable consideration is unimportant.

11. That the act of 1890, chapter 559, repealed the exemption from taxation enjoyed by the plaintiff in error under the act of 1880.

12. That the act of 1890, chapter 559, imposed a tax of 1 per cent. upon the gross receipts within the State of Maryland of the plaintiff in error.

It is submitted that the Maryland court of appeals did not err in deciding the main proposition that the old corporations were destroyed and a new one created by 1854, chapter 250, which is the charter of the plaintiff in error.

In cases quite similar it appears the Supreme Court announced a like conclusion.

Shields *v.* Ohio, 95th U. S., 319, 322, 323, 324.

Railroad Company *v.* Georgia, 98th U. S., 359, 362, 363, 364, 365.

Keokuk and Western Railroad *v.* Missouri, 157th U. S., 301, 305, 308, 309, 310, 312.

3. If it is urged by the plaintiff in error that the court of appeals of Maryland, in 90th Md., p. 447, makes too broad a statement in saying that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to, and is therefore subject to alteration and repeal by future legislatures, it must be remembered that the court is speaking of the act of 1880, chapter 16, which by its title is declared to be an act supplementary to the act of 1854, chapter 250. *That the court decided that the former act was an amendment to the latter act, the charter of the plaintiff in error,* and that since it was not competent for the legislature to grant to the plaintiff in error an irrepealable exemption from taxation by the act of 1854, its charter, it was not competent for the legislature to grant to the plaintiff in error an irrepealable exemption from taxation by the act of 1880, chapter 16, "which was supplemental to or amendatory of the former act," its charter.

The court of appeals of Maryland decided, without regard

to the form of law, that an act which extends a grant to this corporation to include "*immunities*," "as well as all the powers, rights and privileges" which are expressed in the act of 1827, ch. 72," the precise grant in the charter, and adds to this a *specific* grant of a limited immunity from taxation, is an act within the constitutional power of a future legislature to alter or repeal.

This construction by the court of appeals that this statute is within the constitutional prohibition, and that such acts are construed to be supplements to charters and therefore deemed to be repealable, is a most reasonable construction. This court will resolve any reasonable doubt in favor of this construction adopted by the court of appeals of Maryland.

4. It is submitted that all other of these rulings are reasonable, and that the claim of an irrepealable exemption is doubtful.

That as the Supreme Court has said, in Hoge *v.* Railroad Company, 99th U. S., 348, 355: "The intention of the legislature to grant immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty and is essential to every independent government. Whoever therefore claims a surrender must show it in language which will admit of no other reasonable construction. If a doubt arises as to the intent of the legislature it must be solved in favor of the State."

The case of the plaintiff in error fails. If not, it is at least doubtful, and the doubt should be resolved in favor of the State.

This is precisely a case wherein a reasonable doubt should be resolved in favor of the construction of the numerous State statutes which has been adopted in this controversy by the court of appeals of Maryland.

It was said by Mr. Justice White in Board of Liquidations, &c., *v.* Louisiana, 197th U. S., 638:

"When the jurisdiction of this court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract. Nevertheless, when the contract which it is alleged has been impaired arises from a State statute, as said in Burgess *v.* Seligman, 107 U. S., 20, 34, '*for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubts.*'"

And again with emphasis was the rule stated by Mr. Justice Brown in Yazoo and Mississippi Valley Railroad Co. *v.* Adams, 181st U. S., 582, 583:

"Whether this opinion be conclusive upon us in view of the argument that a contract has been impaired in violation of the Constitution, we do not feel called upon to decide. The statutes of the State of Mississippi necessary to be considered for the purpose of ascertaining whether the taxes for the year 1892 accrued prior to October 24th of that year are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such stat-

utes, and the settled rule of this court *is that even in a case where we may exercise an independent judgment any reasonable doubt will be resolved in favor of that construction of the State statutes which has been adopted by the court of last resort in that State"* (Burgess *v.* Seligman, 107th U. S., 20; Floyd *v.* Comm., 109th U. S., 371–379; Clark *v.* Bever, 139th U. S., 96; Board of Liquidations *v.* Louisiana, 179th U. S., 622).

GEORGE R. GAITHER,
LOUIS E. MCCOMAS,
For Defendant in Error.

Supreme Court of the United States.

No. 43.—October Term, 1902.

The Northern Central Railway Company, Plaintiff in Error, vs. The State of Maryland. } In error to the Court of Appeals of the State of Maryland.

[December 1, 1902.]

The Baltimore and Susquehanna Railroad Company was chartered by an act of the legislature of Maryland in 1827, with authority to construct a railroad from the city of Baltimore to the Susquehanna River. The charter contained a provision declaring that the "shares of the capital stock of the company should be deemed and considered personal estate, and should be exempt from the imposition of any tax or burden." It was conceded by both parties in the discussion at bar that the effect of this provision, as interpreted by the settled adjudications of the State of Maryland, was to forever exempt the company and its property from taxation. It was also conceded that at the time this act was passed there was no provision in the constitution of the State of Maryland restricting the legislative power to exempt, and that no reservation of the power to repeal, alter or amend was found in the constitution of the State, or expressed or implied in the charter in question. In 1854 an act was passed by the Maryland legislature, designated as chapter 250 of the laws of that year. The title of this act was as follows:

"An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company and the Susquehanna Railroad Company, by the name of the Northern Central Railway Company."

The companies referred to in this title other than the Baltimore and Susquehanna Railroad were corporations owing their existence to charters granted by the legislature of Pennsylvania, and which were operating railroads in that State connecting with the Baltimore and Susquehanna. The effect of the consolidation was to create one corporation owning and operating one line of railroad from and across the State of Maryland into and across the State of Pennsylvania. The act of 1854 authorizing the consolidation, the title of which has just been stated, by its first section empowered the stockholders of the Baltimore and Susquehanna Railroad, upon their acceptance of the act, "to unite and to consolidate their company or corporation with the York and Maryland Line Railroad,

the York and Cumberland Railroad Company and the Susquehanna Railroad Company of the State of Pennsylvania, so as to form and constitute one company or corporation, to be called the Northern Central Railway Company, on such terms and conditions, and conformably to such agreements and regulations as the said several companies shall respectively determine and adopt, subject nevertheless to the following general provisions: First, that all existing contracts, engagements and liabilities of the said Baltimore and Susquehanna Railroad Company shall continue to bind said company and its property as fully as before the consolidation herein above authorized, or that the said existing contracts, engagements and liabilities shall be duly adopted and assumed by the consolidated company except as herein expressly altered or rescinded; second, that all laws heretofore made in reference to the said Baltimore and Susquehanna Railroad Company and not repealed or modified by the legislature of Maryland, and all ordinances relating to said company heretofore made and not repealed by the mayor and said council of Maryland, shall be binding and operative upon the said consolidated company, so far as its property or its operations may be within the jurisdiction of the State of Maryland or the city of Baltimore respectively, and so far as the laws or ordinances may be applicable to and consistent with the new organization of the said consolidated company; third, that the consolidated company shall have power from time to time to establish its capital stock at an amount not exceeding eight millions of dollars, the same to be represented by such number of shares, and the said consolidated company shall have power to issue their bonds convertible into stock on such terms as the company may prescribe and to secure the same by one or more mortgages for any such amounts as they may find necessary for paying off any existing debt of the company."

After providing for a board of directors and officers of the new or consolidated company, the act proceeded to say: "That the company shall make and use a common seal, and possess all the corporate powers and privileges, and be subject to all the duties and obligations not inconsistent with this act, and its general intent, which are expressed in the charter heretofore granted to the said Baltimore and Susquehanna Railroad Company, and its supplements: *Provided*, That this clause shall not be construed to deprive the parties to the said consolidated company of the right or authority to make such provisions and regulations, notwithstanding said original charter and its supplements, as may be necessary to create and establish said consolidated company, and bring its organization into agreement and consistency with the terms and conditions of the charter of the several companies of which the said consolidated company shall be composed: *And provided also*, That the parties to the consolidated company shall be authorized and empowered to adopt and conform the organization of the said consolidated company to such provisions or enactments as may

be required by the legislature of the State of Pennsylvania, touching the name of said corporation, and of the board of president and directors in said consolidated company, and the conditions relating to their appointments."

The second section of the act, among other things, provided that "This act shall take effect whenever and as soon as the said parties hereinbefore referred to shall have agreed to consolidate their several companies into one and shall have settled, determined and agreed upon the terms and conditions of such consolidation in conformity with the provisions of this act. . . ."

In pursuance of the authority thus conferred upon the Maryland corporation, and in virtue of power granted by the legislature of Pennsylvania to the three Pennsylvania corporations, the consolidation was effected, new stock was issued, and a company came into being known as the Northern Central Railway Company, whose affairs were managed by the new board of directors and officers elected or appointed pursuant to the new charter. The corporation, in availing itself of the provisions of the law of 1854, executed articles of consolidation. Although the act of 1854 only provided that the new corporation should have the corporate "powers and privileges" of the constituent bodies, it is stated in argument that the articles of consolidation executed under the law purported to vest the new corporation with not only the right to the property rights and privileges of the old companies but also with their *immunities*. In 1854, at the time the act of consolidation was passed, the Maryland constitution (of 1850) was in force, and provided in section 47, article 5, as follows:

"That corporation may be formed under general laws, but shall not be created by special act, except for municipal purposes; and in cases where in the judgment of the legislature the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section may be altered from time to time or repealed."

In the years 1872 and 1874 the legislature of Maryland passed an act imposing a tax of one-half of one per cent upon the gross receipts of all steam railroad companies incorporated by the State and doing business therein. Two suits were thereafter (the one in 1873 and the other in 1874) brought by the State of Maryland against the Northern Central Railway Company to recover the one-half of one per cent tax upon the gross receipts of that company from that part of its railroad lying in the State of Maryland. The defense of the company was substantially, first, that it was entitled to the exemption from taxation granted by the act of 1827 to the Baltimore and Susquehanna Company; that such exemption was existing and had not been repealed, and if repealed, the repealing act was void because an impairment of the obligations of the contract resulting from the act of 1827 and the transmission of its immunities to the new company created by the act of 1854. The causes were decided in the trial

court in favor of the corporation. The cases were taken to the Court of Appeals of the State of Maryland. That court (in 1875) reversed the judgment of the court below and remanded the cases for a new trial. The Court of Appeals in its opinion conceded that when in 1827 the charter of the Baltimore and Susquehanna Railroad Company was granted there was no restriction in the constitution of the State on the power of the general assembly to make a contractual exemption from taxation. It also conceded that at that time there was no general power reserved in the constitution to repeal, alter or amend charters, and that no such reservation was found in the charter of 1827. But the court deemed it unnecessary to pass upon the question of whether the consolidation act of 1854 had endowed the new company with the exemption from taxation expressed in the act of 1827, because, conceding *arguendo* this to have been the case, it was held that as the consolidation had created a new company with new stock, new franchises, new rights and new officers, the charter of such newly created company as to all its provisions, including the exemption from taxation, if such exemption were found in it expressly or by implication, was subject to the power to repeal, alter and amend reserved by the Constitution. Construing the acts imposing the tax which were sued for in connection with other laws of the State of Maryland, the court held that the exemption from taxation had been repealed. (44 Md. 162.)

The cause on being remanded to the trial court remained untried in 1880. In that year the legislature of Maryland passed an act on the subject of the taxation of the Northern Central Railway Company. The title of that act purported to adjust and settle finally by agreement all pending controversies on the subject of taxation between the State of Maryland and the railroad company. The preamble referred to and recapitulated the organization of the Baltimore and Susquehanna, the consolidation by the act of 1854, and the pending suits on the subject. The title and preamble are reproduced in the margin.*

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*An act to adjust and settle finally, by agreement, all pending controversies between the State of Maryland and the Northern Central Railway Company, by subjecting the franchises and property of said company within this State to taxation for State purposes to a certain extent, and by providing for the payment of a certain indebtedness claimed by the State of Maryland to exist on the part of said Northern Central Railway Company to said State of Maryland, being an act supplementary to the act of eighteen hundred and fifty-four, chapter two hundred and fifty, entitled An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company, by the name of the Northern Central Railway Company.

Whereas, a controversy has arisen and exists between the State of Maryland and the Northern Central Railway Company in reference to the rights of the State

By the first section of the act it was provided that the Northern Central Railway Company "shall have and possess all the powers, rights, privileges and immunities and be subject to all the duties and obligations which are expressed in the act of assembly of Maryland of 1827, chapter seventy-two, entitled an act to incorporate the Baltimore and Susquehanna Railroad Company, and all the franchises and property of every description and gross receipts of said Northern Central Railway Company within the State of Maryland, shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon the gross receipts from its railroad and franchise lying within the State of Maryland, and from all other sources within this State, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland; . . ." The act further provided for the payment of a designated sum by the railroad company for past taxes, declared

of Maryland to subject to taxation the franchises and property of the Northern Central Railway Company, the said company claiming exemption of the same from taxation upon the grounds that among the terms and conditions of the union and consolidation of the several companies by which said Northern Central Railway Company was formed is one, that the latter should have all the rights, privileges and immunities of each of said companies, which said terms were entered into under the authority given by the act of Maryland of eighteen hundred and fifty-four, chapter two hundred and fifty, which moreover declared that said Northern Central Railway Company should have all the powers and privileges expressed in the charter granted by the State of Maryland to the Baltimore and Susquehanna Railroad Company, among which privileges and immunity from taxation.

And whereas, the State of Maryland having, by the act of eighteen hundred and seventy-two, chapter two hundred and thirty-four, and the act of eighteen hundred and seventy-four, chapter four hundred and eight, imposed an annual tax of one-half of one per centum on the gross receipts of all railroad companies worked by steam incorporated by or under the authority of said State of Maryland, and claiming that under said acts the gross receipts of said Northern Central Railway Company are liable to said tax, have instituted suits to recover the same.

And whereas, the property of said company has been also assessed as liable to taxation for county and municipal purposes.

And whereas, the said company has the right to have the question at issue between it and the State of Maryland carried to the Supreme Court of the United States to be there decided.

And whereas, it has been represented to this general assembly that what would be the ultimate decision of said question is a matter of great doubt, and it is deemed to be moreover just and proper that an equitable settlement should be made of the matters so in controversy and it having been represented to this general assembly that the said Northern Central Railway Company, for the purpose of making such settlement, is willing to pay a tax of one-half of one per centum on the gross receipts within this State, upon the terms and condltions hereinafter set forth; now, therefore—

said payment should acquit such taxes, and directed the discontinuance of all suits pending against the company for such taxes. It was however provided that its provisions should not be operative until the payment which the act required had been made and until the acceptance of the provisions of the act by the stockholders of the company. The act was accepted, the money was paid and the suits were discontinued. At the time of the passage of this act of 1880 the constitution of Maryland of 1867 was in force, and therein it was provided (article 3, section 48): "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created, and any act of incorporation passed in violation of this act shall be void. . . . All charters granted or adopted in pursuance of this section and all charters heretofore granted and created, subject to repeal or modification, may be altered from time to time or be repealed." In accordance with the act of 1880 the company year by year paid the tax on its gross receipts.

In 1890 the State of Maryland passed a general law entitled "An act to provide for State taxation on the revenues of railroad, telegraph or cable, express or transportation, telephone, parlor car, sleeping car, safe deposit, trust, guarantee, fidelity oil or pipe line, title insurance, electric light or electric construction companies incorporated under any general or special law of this State and doing business therein." By this act a tax of one per centum was imposed upon the gross receipts "of all railroad companies worked by steam incorporated by or under the authority of this State and doing business therein." Under the asserted authority of this statute a tax of one per cent was levied by the State in each of the years 1891 to 1895, both inclusive, upon the gross receipts of the Northern Central Railway Company for the year preceding, and these taxes were paid by the company under protest. Upon demand, however, being made in 1896 for payment of the tax of one per cent upon the gross receipts for the year 1895, compliance was refused. A tender by the company of the taxes, calculated at the rate of one-half of one per cent, was refused by the State, and the present action was thereupon brought to recover the taxes thus asserted to be due and payable under the act of 1890. The company defended on the ground that the act of 1880 was a contract protecting it from a higher rate of tax on its gross receipts than in that act specified; that the act had not been repealed; that if repealed the repealing statute was void, because it impaired the obligations of the contract resulting from the act of 1880. There was judgment in favor of the corporation. The case was taken to the Court of Appeals of the State of Maryland and the judgment was reversed, the court holding that the provisions of the act of 1880 had been repealed by State statutes to which

it referred, and that the repeal did not violate the Constitution of the United States by impairing the obligations of the contract, as asserted by the company, because the corporation held its rights subject to the power to repeal, alter and amend, as reserved in the constitution at the time both the acts of 1854 and 1880 were passed. (90 Md. 497.) The case was remanded for a new trial. It was again tried, the Federal defense of the impairment of the obligation of the contract was again specially urged, the case was decided against the corporation, was taken again to the Supreme Court of the State of Maryland. That court, adhering to its former view, affirmed the judgment. It is to this judgment that the present writ of error is prosecuted.

Mr. Justice WHITE, after making the foregoing statement of the case, delivered the opinion of the Court.

In order to confine the controversy arising on this record to the propositions upon which its decision must really rest, to eliminate the questions discussed at bar, which are either irrelevant or so effectually foreclosed by prior decisions of this court as to be no longer open to controversy, the following propositions are stated:

First. Where a contract is claimed to arise from a State law and it is held below that a subsequent statute has repealed the alleged contract and effect is thereby given to the subsequent law, the mere question whether the alleged contract has been repealed by the subsequent law is a State and not a Federal question. In such a case this court concerns itself not with the question whether the State law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the Constitution of the United States. In other words, where the State court has given effect to a subsequent law, this court decides whether such effect, so given by the State court, violates the Constitution of the United States. (*Gulf & Ship Island Railway Company* v. *Hewes*, 183 U. S. 66.) We therefore put out of view the question whether the acts of 1854 or of 1880 were repealed by the subsequent State statutes, as held by the court below, and treating such repeal as an accomplished fact, shall determine whether the repealing acts were void because impairing the obligations of the contract relied upon, in violation of the Constitution of the United States. In considering this question it will be borne in mind that it is elementary that where the constitution of a State reserves the right to repeal, alter or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this

doctrine are so numerous that they need not be cited. We content ourselves, therefore, by referring to one of them: *Citizens' Savings Bank* v. *Owensboro*, (173 U. S. 634, 641.) It is, moreover, conclusively determined that where the constitution of a State reserves the power to repeal, alter or amend a charter, such provision is applicable to the charter of a consolidated corporation where as the result of the consolidation a new corporation takes being, new stock is provided for, new franchises are conferred and new officers appointed. In other words, that where a legislature is inhibited by the constitution from making an irrepealable charter it cannot create a new contract and bring into being a new corporation, and yet by the charter of such corporation give rise to the irrepealable contract which the constitution absolutely prohibits. To state the doctrine in another form, it is this: That where a new corporation is chartered, subject to a constitution which forbids the granting of an irrepealable right, such new corporation cannot become endowed by the effect of a legislative contract with an irrepealable right forbidden by the constitution. If one of the constituent elements of the corporation possessed, prior to the formation of the new corporation, such right, and under the assumption that the right itself passed to the new body, it loses its irrepealable character, because the new corporation is subject by the very law of its being to the provision of the constitution forbidding irrepealable grants.

The doctrine as just stated has been so frequently declared by this court that it is no longer open to discussion. The whole subject has been so recently fully reviewed and restated it is sufficient to refer to that case: *Yazoo & Mississippi Valley Railway Company* v. *Adams*, (180 U. S. 1, 17, *et seq.*, and authorities there cited.)

Coming to apply the principles just stated to the case before us, it is apparent that unless there is something peculiar in this case which takes it from under the control of the doctrine referred to, that the court below correctly held that the new corporation created by the act of 1854 had no irrepealable contract exempting it from taxation either as the result of the act of 1854 or of the act of 1880. The positive prohibition existing in the constitution of the State against irrepealable charter grants both when the act of 1854 and the act of 1880 were passed, renders any other conclusion impossible. But it is insisted that as the constitution of 1867, which was in force when the law of 1880 was enacted, reserved the right to repeal, alter or amend only charters granted or adopted, the act of 1880 did not come within the right to repeal or amend because it was not a charter, but a contract entered into between the State and the corporation. True, the act of 1880 was put, not in the form of a charter amendment, but in that of a contract. The lower court, after quoting from the opinion rendered by it, when the case was before it under the act of 1854 (44 Md.) said:

"It is to be observed that the court did not rest the inability of the legislature to grant to the corporation an irrepealable exemption from taxation upon the form or character of the particular statute then under consideration, but puts it upon the broad ground of want of power in the legislature under the constitution to make such a grant at all. The court certainly in effect determined that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to and is therefore subject to alteration or repeal by future legislatures."

Without pausing to consider whether, as contended, the rule as thus announced may have been in some respects too broadly stated, we think it clear that the mere form adopted by a legislature in conferring a right on a corporation cannot be controlling, for if it were so the provision of the constitution, instead of being commanding and prohibitive would merely be precatory or advisory. We are also clearly of the opinion that the act of 1880, in its essential nature and effect in whatever form couched, was intended to be and necessarily operated as an amendment to the charter of the company created by the act of 1854. Such being its essential nature and necessary effect, we think it plainly came within the provisions of the constitution of 1867, and was therefore subject to repeal, alteration or amendment.

It is strenuously however insisted that this case should not be controlled by the reasons previously stated because of the following considerations: The decision of the Court of Appeals of Maryland under the act of 1854, (44 Md.) it is urged, was not unanimous. There was an elaborate dissent. For this reason and because the case was open to review in this court on the question of the impairment of the obligations of the contract, it is said there was necessarily grave doubt as to the rights of the parties. In view of the foregoing conditions and of such doubt, the act of 1880 embodied but an honest effort by way of contract and compromise to close the doubtful controversy in the interest of both parties, the State on the one hand and the corporation on the other, hence the act of 1880 was not subject to repeal, alteration or amendment. Conceding, *arguendo*, the premise upon which the above deduction is based, the conclusion itself is devoid of foundation. It but reiterates in another mode of statement the argument that the form in which a contract is couched, and not its substance and necessary effect, is the criterion by which to ascertain whether it is controlled by the constitutional provision forbidding irrepealable contracts. Moreover it disregards the elementary principle that the power to grant an irrepealable right by a compromise agreement depended on the existence of the authority to make such grant by original action. The power to compromise on the subject was as limited as the power to contract originally. *The District of Columbia* v. *Bailey*, (1897) 171 U. S. 161. Indeed, the entire argument upon this branch of the case, reiterated in

many forms, amounts but to the contention, when ultimately considered, that because the act of 1880 is asserted to have been enacted with the view of settling what was honestly deemed to be a pending and serious controversy, it was unwise, and it may be unjust to repeal it. Pretermitting the infirmity in the proposition which naturally is suggested by the fact that shortly after the decision in 44 Md. this court decided that the possession of the rights and privileges of a former corporation did not endow a new corporation with an exemption from taxation enjoyed by the old, *Morgan* v. *Louisiana*, (1876) 93 U. S. 217, and putting out of view the other cases to the same effect, decided by this court prior to 1880, the proposition is untenable. It but invokes reasons of expediency or policy. Into these considerations we may not enter; we are concerned alone with the question of power, and on passing on such question cannot hold that an act which by the very terms of the State constitution was made repealable, nevertheless engendered an irrepealable contract protected from impairment by the Constitution of the United States.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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